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The Legalized Outlaw

BY

SAMUEL R. ARTMAN

Judge of the 20th Judicial Circuit of Indiana

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By SAMUEL R. ARTMAN

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California

They are slaves who fear to speak
For the fallen and the weak;
They are slaves who will not choose
Hatred, scoffing and abuse
Rather than in silence shrink
From the truth they needs must think.
They are slaves who dare not be
In the right with two or three.

—James Russell Lowell.

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PREFACE

In all governmental affairs, the people occupy the position of sovereign; they are the principal, and those, who are entrusted with the functions of administration, whether in a judicial, legislative or executive capacity, are merely their agents, with certain limited powers. The agent can never become superior to the principal.

Upon judicial, legislative and executive matters, involving questions of principle, the people themselves constitute the supreme and ultimate tribunal, to whom such matters must be finally submitted, and by whom, at last, they shall be determined.

It is not the province of courts to determine principles, but cases. A trial court, in a matter from which there is no appeal, always determines a case, while, in appealable cases, it determines cases, subject to review by a higher court. In other words, a court of last resort always determines cases, but not questions or principles. In determining cases, courts must apply principles, and, hence, in order to rightly decide the case, the court should have a correct understanding of the principles.

The people have placed the determination of cases beyond their control; they have confided this matter absolutely to the courts; but not so as to principles, for, as to them, they have reserved unto themselves the power of final settlement.

Some years ago, in a county seat town, in Indiana, there was a saloon on the main street, lead-

ing from the railroad station to the business part of the town, and, about one hundred and fifty feet from the railroad station. In front of the saloon and across the sidewalk was suspended a wide board, upon either side of which was painted the representation of a goblet of foaming beer. On the side next to the railroad station were painted, immediately above this representation, the words, "First Chance," while, on the opposite side, in the same relative position, were the words, "Last Chance." By this saloon sign, we may illustrate the province of trial and supreme courts, and the prerogative of the people.

In the decision of *cases* the trial court is the *first chance*, and the supreme court is the *last chance*, but, in the decision of *questions*, the people are always the *last chance;* they are the rightful masters of judges, executives and legislators. Whenever either refuses to apply a principle in consonance with the will of the sovereign, the people have the unqualified right to supply his place with a representative that will administer in harmony with their wishes, and thus the question is determined by them.

When the courts say that the saloon results in much evil; that it is detrimental to society; that it is dangerous to public and private morals; that it is dangerous to public safety and good order; that it propagates crime and dispenses misery and suffering, they decide a question of fact in harmony with the universal knowledge of the people, and the people are pleased with this just finding of fact. And when the courts say that no person has

a right to carry on, upon his own premises or elsewhere, for his own gain or amusement, any public business, clearly calculated to injure and destroy public morals, or to disturb the public peace, they announce a principle of law that springs from the very purpose of government, and a principle, which, even the unlettered laity must recognize as sound.

But, when a court, in the same opinion in which it places this just estimate upon the saloon and announces this universally recognized principle of law, also declares the saloon to be inherently lawful and to stand upon the same legal basis as the innocent and useful pursuits of the drygoods-man, the grocery-man and the hardware-man, the people must surely realize that the principle has not been correctly applied to the fact. If the principle be applied to the fact announced, the conclusion must be that the saloon is inherently unlawful. This principle of law can not correctly place upon the same legal basis that which is beneficial to society and that which is detrimental to it. When measured by this standard, the one is surely lawful, and the other just as certainly an outlaw.

With a view to submitting the reasonableness of this contention, to the Supreme people, the question is feebly argued in the following pages, without any pretense of superior wisdom or information, but with an abiding faith in the correctness of the conclusion. There is no claim to any new discovery; but merely a plea for the same application of a principle of law, as old as the government, to the saloon, as is made to other acts and pursuits,

of like inherent, injurious character. The reader is invited to read with an open and unprejudiced mind, and then to draw the natural conclusion, which reason and logic may prompt.

CHAPTER I

HOW THE WRITER WAS INDUCED TO PREPARE THIS VOLUME

At the January term, 1900, there was tried in the Circuit Court of Boone County, Indiana, the case of Tron vs. Lewis, 31 Indiana Appellate 178, in which the plaintiff sought to enjoin a licensed saloon keeper from selling and delivering intoxicating liquor to his patrons on grounds adjacent to the saloon building. The writer, then in the practice of the law, was employed in the prosecution of this case.

The preparation for the trial of this case required an examination of many court decisions involving the legal status of the liquor traffic.

In the examination of these opinions, the writer became convinced that many of them were antagonistic to each other, and that some of the opinions contained, within themselves, contradictory propositions. In reaching such a conclusion, of course, the writer became a member of the detestable and despicable order of cranks.

Holmes says: "A crank is a man who does his own thinking."

The converse of this is, that those men, who are not cranks, do not do their own thinking; they blindly follow precedents.

In Welsh vs. State, 126 Ind. 73, it was declared that, in selling, "a saloon keeper was merely exercising his common law right." And then, the same opinion says: "If it were not for the license statute,

every person would be as free to engage in the business of selling intoxicating liquor as he would to engage in the sale of any other property. Acting upon the just assumption that the unrestricted sale of intoxicating liquor results in much evil and that it is detrimental to society, the law-making power in each state has assumed to control, etc., the business."

Naturally, to a crank, there would come a suggestion as to whether that which results in much evil and is detrimental to society can have the same common law footing as that which results in no evil and which is beneficial to society, and the crank guesses not. They belong to different classes by reason of their effects upon society, and, thus belonging to different classes, does the law accord them the same position? Certainly not. The court did in this case, but no principle of law ever did.

In Haggart vs. Stehlin, 137 Ind. 43, the court said: "In the absence of the license statute, every man, woman and child, in the state, if they chose so to do, would have the absolute and unqualified right to engage in the saloon business.

"They could stand up and say, our business stands on the same legal basis as that of the dry goods merchant, the groceryman, the hardware merchant or any legitimate business. The license law treats the traffic as dangerous, as dangerous to public and private morals and as dangerous to the public peace and the good order of society."

The crank at once says to himself, the dry goods business, the grocery business and the hardware business are not dangerous, dangerous to public

and private morals, dangerous to the public peace and the good order of society, and, if not, how can common sense place them on the same legal basis as a pursuit that is? To do so, is to place safety on the same legal plane with danger, private morality on the same as private immorality, public decency with public indecency, public peace with public turmoil and public order with public disorder.

Certainly a man, who thinks, can not reason to the conclusion that the end of government, justice between man and man, can or does permit such things, of such different character, to occupy the same legal basis.

And, especially is this true, if he accept as correct the following statement of the court in this same opinion: "No person has a right to carry on, upon his own premises or elsewhere, for his own gain or amusement, any public business clearly calculated to injure and destroy public morals, or to disturb the public peace. No man is at liberty to use his own property without reference to the health, comfort or reasonable enjoyment of like public or private rights by others."

In view of the estimate, the court itself, placed upon the saloon, the inquiring mind readily concludes that the court, by the language last quoted, declares that no man has a right to conduct a saloon upon his own premises or elsewhere. How can the court or any reasonable man harmonize the statements in this opinion upon the theory that any man has an absolute and unqualified right to pursue the liquor traffic?

Speaking of the license the court, in this case, says: "It did not enlarge his rights, but restricted them within narrower limits than they were before. It is a mere permit given to sell." An active intellect can not believe that a license is, at the same time, both a restriction of absolute and unqualified rights and yet a mere permit given to sell.

To the man who swallows the statements of Supreme Courts, as a young robin swallows worms, these two statements may be logical and harmonious, but they can not be to the man who thinks.

In preparing for the trial of the Tron-Lewis case, the writer studied, among others, the cases of State vs. Gerhardt, 145 Ind. 439; Crowley vs. Christenson, 137 U. S. 86; Sherlock vs. Stuart, 96 Mich. 198; and George vs. Aiken, 26 L. R. A. 345, wherein it was said, in various forms of expression, that no man has a constitutional, an inalienable, an inherent, a natural or a common law right to keep a saloon, and that to do so is not the privilege of a citizen either of the state or of the United States.

The thinking man very naturally wonders how the saloon business can be an absolute and unqualified right, which every man, woman and child in the state may pursue, if they so desire, and yet, it can be, at the same time, logically held that no man has a constitutional, an inalienable, an inherent, a natural or a common law right to engage therein and that to do so is not the privilege of a citizen either of the state or of the United States.

In the George-Aiken case, the Supreme Court of South Carolina said: "The licensed saloon keeper

does not sell liquor by reason of an inalienable right inherent in citizenship, but because the government has delegated to him the exercise of such rights."

The analytic mind finds great difficulty in harmonizing the propositions, that the saloon business is an absolute, unqualified right, and, at the same time, a right that does not inhere in citizenship, and, how can it be possible for the saloon license to limit the pre-existing rights of the saloon keeper, and yet delegate to him the right to conduct the business? Of course, it is cranky to believe that a delegated right is not a pre-existing right.

In the George-Aiken case it was also said: "It is because liquor is not regarded as one of the ordinary commodities that the act of 1892, prohibiting its sale, was, as to that matter, construed to be constitutional. We cannot for a moment believe that the court would have declared an act constitutional that prohibited entirely the sale of corn, cotton, or other ordinary commodities. It is fallacious to argue, in the light of this distinction, so thoroughly sustained by the authorities, that, if the government can take the exclusive control of the liquor traffic, it can do so as to any other avocations in life."

The United States Supreme Court, in Crowley vs. Christenson, 137 U. S. 86, said: "As it is a business attended with danger to the community, it may, as already stated, be entirely prohibited."

A freak is, at once, inclined to inquire, if a business that may be entirely prohibited and one that can not be prohibited entirely can possibly

stand upon the same legal basis. If so, then two things, diametrically the opposite of each other, and upon which the law can not operate with the same effect, have the same legal basis.

There are many other opinions, in which the propositions of law announced, are as contradictory and antagonistic as those cited, but those cited serve to illustrate the state of mind in which the writer was left, after studying them.

He could not accept the estimate placed upon the saloon, by the courts, and then approve the declaration that it stands upon the same legal basis as the selling of corn, cotton, dry goods, groceries or hardware; nor accept the statement that the saloon may be entirely prohibited and, notwithstanding this fact, it does have the same legal standing as a pursuit that can not be prohibited entirely; nor the declaration that danger, disorder and immorality have the same respect in the law as safety, peace and morality, and, especially so, when a court, in a single opinion, both affirms and denies the proposition; nor the declaration that the saloon is a common right, and yet, at the same time, it is not the privilege of a citizen of the state or of the United States; nor the declaration that a saloon license is both a prohibition and a mere permit.

The writer reached the conclusion that the estimate placed upon the saloon, by the courts, was correct, and that, in view of that fact, the general principles of the law can be harmonized only on the theory that the saloon is inherently unlawful, because inherently lawless, and, being inherently lawless, because attended with danger and destructive

effects to the purposes of government, the law-making department can not lawfully legalize it. Having developed this hallucination and having thereby become a crank, the writer, for more than seven years, had been feeding his delusion by gathering authorities bearing thereon, hoping, sometime, to have the opportunity to submit the conclusion to the public.

In August, 1906, Hon. Enoch G. Hogate, Dean of the Law Department of the Indiana State University, requested the writer to select his own subject and deliver thereon, sometime during the year, an address to the law students of the university. The writer accepted, selected as his subject, "The Legal Status of the Liquor Traffic," and prepared the manuscript of the address in December, 1906.

Soon thereafter, there was filed in the Circuit Court of Boone County, on change of venue, from Marion, the case of Albert Soltau vs. Schuyler Young and William J. Trefz, which was an application for a retail saloon license.

In this case, the right of the legislature to authorize the licensing of the saloon, was the only issue, and this gave the writer the opportunity to officially declare his views on the question, which he did, in a written opinion, declaring the saloon license statute of Indiana to be unconstitutional.

Following the announcement of this opinion, the writer was, at once, deluged with telegrams and letters of congratulation, receiving more than two thousand of such letters. Letters came from every state and territory in the union, from Cuba,

Hawaii, the Philippine Islands, New Zealand, Canada, South Africa, France and England.

The matter was given extensive notice in both the news and editorial columns of the newspapers. It was printed in full in many church, anti-saloon, Prohibition, Democratic and Republican papers and in a few law journals. It was ordered printed, as a public document, by the United States Senate, and was so printed as "Senate Document, No. 384." In all, it is conservatively estimated that, at least, one million copies of this opinion, have been printed and distributed in the United States.

The editorial comments were varied, some being complimentary in the superlative degree, while others were given to severe criticism, framed in a spirit of satire, ridicule, irony and acrimony. This was especially true of the editorials in the Indianapolis Star and the Indianapolis News, both of which went to the very verge, if not wholly to the point, of questioning the motives of the writer in rendering the opinion. However, it may not be amiss, to note that, in the issue in which the Star made its most bitter assault, it carried thirty-eight inches of liquor notices and advertisements, and, in the issue in which the News indulged in its most flagrant satire and ridicule, it carried forty-seven inches of such notices and advertisements.

Immediately after the announcement of the opinion, the writer was importuned to take the platform and discuss the question publicly. After hesitating for several weeks, he undertook the task, has discussed the question to one hundred and twenty-five different audiences, has visited thirty-eight states,

traveling about twenty thousand miles, and, it can be truthfully said that, almost without exception, the meetings were successful. The interest and the attendance were much beyond any one's most hopeful anticipation, indicative of the wide-spread and deep-seated antagonism to the saloon, which is now at high-tide throughout the whole country.

On every hand, the writer has been requested to discuss the subject in detail for publication, and a compliance with such requests is the only excuse offered for this publication.

CHAPTER II

JUDICIAL PRECEDENTS ARE NOT INFALLIBLE

The preceding chapter doubtless illustrates the generally recognized fact that judicial opinions are not infallible. The application of legal principles is not bound by an inflexible, unchangeable rule, announced by some court in the remote past. If this were true, then the test of a judge's capability would be his power to remember and find what past judges have said. This would dispense with any necessity for the exercise of his powers of reason, and would limit his labor to the search of digests and opinions. It would bind us to the proposition that the law had attained its perfection in the ages past; it would bind us to the theory that the first judicial opinion on any question conclusively determined, for all future time, that question, and that future judges, to know the law on such proposition, need only know what the first judge had said.

This theory would deny absolutely the possibility of advancement and progress in the application of legal principles, and would tie us irretrievably to the doctrine of human perfection in judicial ermine. Judicial opinions, at any given period, can be no more than the expression of the best understanding of the judges of that time of the rule of the equality of rights and obligations among men. To accord to judicial opinions the compliment of infallibility is to assert that the first judge who makes a decision upon any question has complete and per-

fect knowledge of the matter, when, in fact, civilization, at any given time, does and should embrace the sum total of all that has been acquired and learned by experience in all the ages past, and this is as certainly true of the law, as it is of any other branch knowledge.

No good principle or thought of the past should be forgotten or unheeded merely because it may be hoary with age, but, to adhere unchangeably to precedent, is often times, to chain one's self to error as securely, as was mythical Prometheus chained to the rock; so that the cormorants of vice and greed would feed upon society as did the mythical vulture feed upon the liver of Prometheus. And a blind adherence to an unfounded precedent is allowing the saloon vulture to feed and thrive upon the misery, the woe, the vice, the crime and the blasted character of the twentieth-century man and womanhood to-day, sheltered and protected under the guise and garb of the law. The court that follows precedents, merely because they are precedents, searching for cases as the traveler looks for the guidepost, is as likely to perpetuate error as it is to correct it. It ignores the rule that a question, involving principle, is never settled until it is rightly decided, and proceeds upon the theory that the first decision determines the question, even though the decision may be wrong.

The multiplicity of precedents within itself ought to suggest the inadvisability of blind adherence to them, especially in view of the glaring want of uniformity.

There is about as much diversity in the opinions

of judges and courts as there is in the opinions of expert medical witnesses in a well-financed murder trial, involving the convenient defense of detachable insanity.

The following language of Judge Frank S. Roby, of the Indiana Appellate Court, is very vividly illustrative of this point: "The number of reported cases available is enormous and is being constantly multiplied. By diligence, one may find a precedent of some sort on any side of almost any proposition. It is a mere matter of eye-sight, time and digests. A lawyer cannot rely alone upon cases. He must run the red line of principle through all his reading and view every conclusion of every court, in the light of conscience, humanity and justice. Failing to do so, his position is akin to that of one adrift upon the sea, without rudder, or compass. It is only by the simple rules of common honesty and fair dealing that he is able to distinguish between bad precedents and good ones. It is only thus that he can know truth, and knowing, assert and sustain it. So inspired, he will not confuse the substance of justice with absurd artificialities of practice. If this be true of the lawyer it is also true of the judge."

A very familiar example of this condition is the United States Supreme Court, because of the well known fact that it decides less than fifty per cent. of its cases by a unanimous bench. For the trial judge or any other judge to accept the first precedent he may find as a finality, is often to declare to be true that which is false and to declare to be false that which is true.

The law is not thus absurd, but court opinions frequently are. Such opinions should be ignored by both lawyers and judges, for, as said by Judge Roby: "In the progress of the law no condition can arise in which any precedent can compel a court to declare that true which it knows to be untrue, or to hesitate in applying to any given set of facts, which may arise, principles according with our institutions and the spirit of natural and equal justice."

Much of the difficulty and embarrassment, occasioned by following precedents without investigating principles, may be obviated, if we would but remember that a decision of a court of last resort can absolutely determine but a single case, and that, the one decided. The decisions of courts of last resort settle cases, but not necessarily principles or questions.

THE INDIANA LOTTERY CASES

When the Supreme Court of Indiana, in 1879, declared that lottery gambling was a vested right, it determined the Kellum case that way and reversed a correct judgment of a circuit court, but it did not determine the lottery question that way, because the truth could not be transformed into error, while an error might be and was committed.

In the Woodward case, the circuit court followed the precedent of the Supreme Court in the Kellum case, and held that lottery gambling was a vested right in Indiana, thereby rendering an erroneous judgment, but, in this case, the Supreme Court ignored its own precedent in the Kellum

case, decided the Woodward case according to the principle of truth and justice, and reversed the circuit court that had adhered to the precedent announced by the Supreme Court only four years before.

THE DRED SCOTT CASE AND LINCOLN'S DISSENT

In the decision of the Dred Scott case, the Supreme Court of the United States determined that case, but it fell far short of determining the Dred Scott question. While acknowledging that the decision in this cause absolutely and unequivocally determined the status of Dred Scott, Abraham Lincoln dissented from the opinion as a precedent, and vigorously and vehemently denounced it as unfounded from the standpoint of legal principles. For his position, Mr. Lincoln was bitterly arraigned through the public press and from the stump by political adversaries.

He was styled, "A legal non-entity;" "An anarchist;" "A judicial lunatic;" "A four-flusher;" "An inciter of disrespect for the courts;" "A panderer to mob spirit;" "a buffoon, with his ear to the ground, to catch the acclaim of public sentiment." Some of these epithets, just now, are quite familiar to the writer, because of their use and application to him by liquor journals and that element of newspapers, bribed and subsidized by saloon notices and liquor advertisements.

LINCOLN'S ANSWER

Lincoln answered his assailants by saying, in his debates with Douglas: "Judicial decisions have two

uses—first, to absolutely determine the case decided; and secondly to indicate to the public how other similar cases will be decided when they arise. For the latter use, they are called 'precedents' and 'authorities.' Judicial decisions are of greater or less authority as precedents, according to circumstances. That this should be so, accords both with common sense, and the customary understanding of the legal profession.

"It is not resistence, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country.

"This man sticks to a decision which forbids the people of a Territory from excluding slavery, and he does so, not because he says it is right in itself—he does not give any opinion on that—but because it has been decided by the court; and being decided by the court, he is, and you are, bound to take it in your political action as law, not that he judges at all of its merits, but because a decision of the court is to him a 'Thus saith the Lord.' He places it on that ground alone; and you will bear in mind that thus committing himself unreservedly to this decision, he commits him to the next one just as firmly as to this. He did not commit himself on account of the merit or demerit of the decision, but it is a 'Thus saith the Lord.' The next decision, as much as this, will be a 'Thus saith the Lord.'"

JACKSON'S POSITION

In justification of his position, Mr. Lincoln quoted from President Jackson's veto message on the National Bank bill the following: "It is main-

tained by the advocates of the bank, that its constitutionality in all its features, ought to be considered as settled by precedent, and by the decision of the Supreme Court. To this conclusion I can not assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power, except where the acquiescence of the people and the States can be considered as well as settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress in 1791, decided in favor of a bank; another in 1811, decided against it. One Congress in 1815 decided against a bank; another in 1816, decided in its favor. Prior to the present Congress, therefore, the precedents drawn from that source were equal. If we resort to the States, the expressions of legislative, judicial, and executive opinions against the bank have been probably to those in its favor as four to one. There is nothing in precedent, therefore, which, if its authority were admitted, ought to weigh in favor of the act before me.

"If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the co-ordinate authorities of this Government. The Congress, the executive, and the Court, must, each for itself, be guided by its own opinions of the Constitution. Each public officer, who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by others."

THE POINT OF RESISTANCE

Again Mr. Lincoln says: "Now, as to the Dred Scott decision; for upon that he makes his last point at me. He boldly takes ground in favor of that decision.

"This is one-half of the onslaught, and one-third of the entire plan of the campaign. I am opposed to that decision in a certain sense, but not in the sense which he puts on it. I say that in so far as it decided in favor of Dred Scott's master, and against Dred Scott and his family, I do not propose to disturb or resist the decision.

"I never have proposed to do any such thing. I think that in respect for judicial authority my humble history would not suffer in comparison with that of Judge Douglas. He would have the citizen conform his vote to that decision; the member of Congress, his; the President, his use of the veto power. He would make it a rule of political action for the people and all the departments of the Government. I would not. By resisting it as a political rule, I disturb no right of property, create no disorder, excite no mobs."

THE VIEWPOINT OF THOMAS JEFFERSON

As bearing upon the fancied infallibility of a Supreme Court opinion, Mr. Lincoln quoted from the seventh volume, page 177, of the Correspondence of Thomas Jefferson, the following language of Mr. Jefferson on that very proposition:

"That it will have this tendency may be expected, and for that reason I feel an urgency to note what I deem an error in it, the more requiring

notice as your opinion is strengthened by that of many others. You seem, in page 84 and 148, to consider the judges as the ultimate arbiters of all constitutional questions—a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. Their maxim is, 'Boni judicis est ampiare jurisdictionem'; and their power is the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that, to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves."

In claiming the right to apply the test of reason to Supreme Court precedents on the status of the saloon, we are merely following the footsteps of Jefferson, Jackson, Lincoln and Judge Roby.

CHAPTER III

THE SALOON AS A CAUSE

The intelligent discussion of any question requires that the particular proposition to be dealt with shall be clearly defined; otherwise the writer may be drawn into a consideration of irrelevant matters.

The *temperance question* is a very comprehensive subject, but it is the purpose of the writer to deal with only one phase of the subject—the saloon. There is a vast difference between the drink saloon of a community and the drink habit of an individual. The saloon is a public institution, while the drink habit is an element of individual character, but, yet, the two are necessarily inseparable. The immoral, the debasing, the degrading and pauperizing results of the drink habit are universally known and recognized, and an enlightened public conscience must treat these deplorable results as the natural effects of a precedent, producing cause.

The drink saloon creates, develops and produces the drink habit, and is, therefore, the responsible cause of all the evils flowing from the latter. The drink saloon is a cause, and the evil results of the drink habit are its natural offspring. It is the purpose of the writer to concentrate the attention of the reader upon the cause—the mother.

No proposition of reason is clearer and truer than the statement, *"by their fruits ye shall know them,"* hence the character and legal standing of

the saloon must be determined from an investigation of its natural results. The character of the effect must determine the character of the cause. If the natural effects invite legal sanction and approbation, then the cause is entitled to legal approval, but, if the inherent effects deserve the condemnation of the law, then the law, inevitably, must condemn the cause.

THE SALOON A POISON STORE.

The stock, handled and sold in the drink saloon, to a large degree, determines the character of the institution. The article, handled and sold, is intoxicating liquor. Intoxicating means *poisonous.* The proper definition of the drink saloon is, therefore, *a poison store,* and the correct definition of a saloon keeper is *a poison seller.*

It has been one of the standing arguments of saloon keepers that the drink traffic is legitimate commerce and is, for that reason, entitled to the same standing before the law as the selling of the ordinary necessities of life, such as breadstuffs and clothing.

The distinction is so apparent that the mere statement of the proposition is its own refutation. The commodity, in the one case, ministers to the sustenance, comfort and happiness of man, and, in the other, it feeds his depravity and lures him to idleness, pauperism, vice and crime.

Groundless, as the contention certainly is, courts have been called upon to express an opinion upon

it and have done so. The Supreme Court of South Carolina, in the case of the State ex rel George vs. Aiken, 26 L. R. A. 345, said: "Liquor, in its nature, is dangerous to the morals, good order, health and safety of the people, and is not to be placed upon the same footing with the ordinary commodities of life, such as corn, wheat, cotton, potatoes, etc."

The Supreme Court of Kansas, in the case of Durien vs. State, 80 Pac. 987, said: "The commodity in controversy is intoxicating liquor. The article is one whose moderate use, even, is taken into account by actuaries of insurance companies, and which bars employment in classes of service involving prudent and careful conduct—an article conceded to be fraught with such contagious peril to society, that it occupies a different status before the courts and the legislatures from other kinds of property, and places traffic in it upon a different plane from other kinds of business. It is still the prolific source of disease, misery, pauperism, vice and crime. Its power to weaken, corrupt, debauch and slay human character and human life is not destroyed or impaired because it may be susceptible of some innocent uses, or may be used with propriety on some occasions. The health, morals, peace and safety of the community at large are still threatened."

In the case of Scmidt vs. City of Indianapolis, 80 N. E. 632, the Supreme Court of Indiana, declared that the liquor traffic is not a harmless and useful occupation, but an occupation that is hurtful, harmful and pernicious to society.

THE EFFECTS OF THE SALOON ARE NOT CONFINED TO THE DRINKERS

Another reason that has been urged against the suppression of the saloon, by the law, is the contention that the use of liquor is a matter of the individual taste of the person indulging. In other words, that it is one of the God given rights of man to select his own food and drink, free from governmental interference. This contention, as it applies to the use of intoxicating liquor, as a beverage, has been answered by the United States Supreme Court, in the case of Crowley vs. Christenson, 137 U. S. 86, as follows: "It is urged that, as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted, and is confined to the party offending, their sale should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation.

"There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him."

It is as a cause of evil and pernicious effects to

third parties that the courts justify governmental interference with the saloon.

ILLUSTRATIONS OF THE SALOON AS A CAUSE

For the purpose of disclosing the extent to which the saloon is regarded as a cause of harmful results to society attention is called to the following: State Senator Mattingly, the high license champion of Indiana, says: "Fully ninety per cent. of all crime may be justly traced to the use of intoxicating liquor."

Governor Durbin's message to the Indiana General Assembly of 1905: "More and more as I have looked into the personnel of the unfortunates who crowd our penal and charitable institutions, I am impressed with the large part sustained by the liquor traffic in recruiting the poor house, the insane hospital, the jail and the penitentiary."

Governor Hanly, of Indiana: "For three years I have witnessed an unending procession of women —mothers, daughters and wives—coming with broken hearts and in tears to the executive chamber to plead for clemency for loved ones who have transgressed the law and whose liberty the State has taken away. I have read hundreds of criminal records in my hotel, in my home, in the executive office and in railway trains, and in eighty-five per cent. of the cases the cause can be traced to the excessive use of intoxicating liquors."

Ex-Congressman W. D. Bynum, of the Indianapolis District: "The courts have taken advanced grounds on the liquor question within recent years. They have pronounced it an evil without one

redeeming feature; a nuisance in any habitation fit to reside in; as inimical to society; the propagator of crime and the dispenser of untold misery and suffering."

Supreme Court of the United States in Crowley vs. Christenson, 137 U. S. 86: "By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source."

So, we are to ascertain the proper legal status of an institution, which is the propagator of more crime and the dispenser of more suffering in each one of the states than any other cause; an institution which is a recruiting station for the poor house, the insane asylum, the jail and the penitentiary; and which, for three years, has kept up an unending procession of broken hearted women—mothers, daughters and wives—to the executive chambers of Indiana, to plead for clemency for loved ones, whose liberty the state had taken away, as a penalty for crimes committed.

The City Prosecutor recently said: "It is true that three-fourths of the crimes of Chicago are due to the saloon."

A. F. Knotts, a former Mayor of Hammond, Indiana: "Ninety-five per cent. of all crimes is caused directly or indirectly by drink. The police

records of our city show that more than ninety per cent. of all the offenses committed are the results of intemperance, and that the police force, maintained at an expense of $15,000 a year, is almost wholly and exclusively employed in watching and caring for men, women and children affected by drink."

Judge Gookins, in the case of Beebe vs. the State, 6 Ind. 542, said: "That drunkenness is an evil, both to the individual and to the state, will probably be admitted. That its legitimate consequences are disease and destruction to the mind and body, will also be granted. That it produces from four-fifths to nine-tenths of all the crimes committed, is the united testimony of those judges, prison-keepers, sheriffs, and others engaged in the administration of the criminal law, who have investigated the subject. That taxation to meet the expenses of pauperism and crime, falls upon and is borne by the people, follows as a matter of course. That its tendency is to destroy the peace, safety and well-being of the people, to secure which the first article in the Bill of Rights declares all free governments are instituted, is too obvious to be denied."

CHILD LABOR

Senator Beveridge has greatly aroused the sympathies of the people of the United States for the child laborers, and the conditions that he depicts are truly deplorable. The difficulty with his crusade is that he is proposing to doctor the effects alone, without treating the cause at all. Reliable

authorities on the child labor problem claim that fifty per cent. of the child laborers of the entire nation are such from sheer, abject necessity in the drunkenness of one or both parents.

Innocent children are compelled to perform, day in and day out, the most slavish drudgery, to avoid starvation, because the saloon has deprived them of parental support. It would naturally seem that the sincere child-sympathizer would do the child the greatest service by striking at the greatest cause of his miseries—the saloon.

CHAPTER IV

THE COMMON LAW STATUS OF THE SALOON

In debating any question, it is of first importance, for the contestants to find an agreed and common starting point, if possible.

As against the saloon, its opponents pin their faith to the contention that it is a legalized institution—legalized by the license, while, in its favor, its supporters claim that it is a common law right, and that the saloon license is merely a limitation or restriction upon the free exercise and enjoyment of that right.

Simplified, the first contention is, that the saloon is unlawful at common law, while the second is, that it is lawful at common law, so that we reach a common or an agreed starting point on the common law status of the saloon. We are to take the saloon, in its original native state, unmodified and untouched by legislation, and measure it by the common law. In other words, the unlicensed saloon. If it is unlawful at common law, then it is legalized by the license. If it is lawful at common law, then the license is not a means of legalizing it. To find a satisfactory answer to these antagonistic propositions, we must ascertain by what standard the institution is to be weighed and what estimate we should place upon it. We can not well determine the common law standard without first defining the common law.

THE COMMON LAW DEFINED

The common law is defined to be *"the unwritten law,"* to distinguish it from statutory law, and sometimes as *court made law* or *"the law enacted by judicial legislation,"* to distinguish it from that formally enacted by legislative bodies.

The meaning of the phrase, *the unwritten law,* probably, can not be more clearly expressed than it was by the United States Supreme Court, when, speaking by Chief Justice John Marshall, it said: "The mere act of instituting a state government adopts, without reducing them to writing, those general, legal principles necessary to secure the safety and authority of the state as a body politic and to preserve its constituent members in safety, peace, health and morality, and these general, unwritten, legal principles constitute the common law."

The adoption, merely by organizing a government, of those general, legal principles necessary to preserve the safety, peace, health and morals of the people, necessarily makes unlawful and imposes a prohibition against those pursuits and acts which, within themselves, endanger the safety, peace, health and morals of the people.

From time to time, in the progress of society, courts have been called upon to interpret the unwritten principles, rules and maxims of the common law and to make application of them to specific cases, and, in doing so, they have announced the tests and standards by which we are to ascertain

whether an act or a pursuit is lawful or unlawful at common law.

THE ENGLISH RULE

The Court of King's Bench, speaking by Lord Mansfield, said: "It is the duty of the judge, in each particular case, to make a practical application of the rule of right and wrong, and that rule is the common law of England.

"There is no other or higher law.

"The rule embodies the essence of the purpose of government. If any pretended principle of law is advanced to prevent the application of the rule of right, the pretended principle is certainly wrong, and can not require the court to determine that to be true, which the court believes and knows to be untrue."

THE MISSOURI RULE

The Supreme Court of Missouri has said: "The supreme principle of the common law is the *public good.*" This principle is so sacredly regarded in that state that there is imprinted upon the seal of the state the latin words, salus populi suprema lex, which, in English, mean that the public good is the supreme law. And this expression has been used approvingly many times by the United States Supreme Court and by many, if not all, the State Supreme Courts.

THE ILLINOIS RULE

The Illinois Supreme Court has declared: "That the public welfare is the underlying principle of the common law."

THE SOUTH CAROLINA RULE

The South Carolina Supreme Court says: "The self-preservation of society is the fundamental principle of the common law. The self-preservation of society is the first law of government, as the self-defense of the person is the first law of the individual."

THE INDIANA RULE

The Supreme Court of Indiana says: "Public policy is that principle of the common law, which, in the absence of any statute, treats as unlawful all acts, trades and pursuits, which naturally and inherently endanger the public order, the public morals or the public good."

BLACKSTONE'S RULE

"The law is a rule of civil conduct, prescribed by the supreme power of a state, commanding what is right and prohibiting what is wrong."

THE RULE OF THE INDIANAPOLIS NEWS

The Indianapolis News is a very ably edited newspaper, which rightfully assumes to instruct its readers upon all constitutional and legal questions that arise in the course of current events. On the 31st day of August, 1907, the News, editorially, said: "No man has an inherent or any other kind of a right to do that which is wrong."

So, we have the test and standard of the common law announced, from these sources, as the safety, the peace, the health, the morals of the people, the public good, the general welfare, the self-

preservation of society, the public order and the rule of right.

The saloon is to be measured by this standard. If it harmonize with it, we must conclude that it is lawful at common law, but, if it run counter to this standard, it is just as certainly unlawful at common law. What estimate are we to place upon the saloon? Not the estimate of the writer, but as nearly as possible the estimate of the authorities, from whom we have borrowed the definition of the common law standard.

THE ESTIMATES TO BE APPLIED

The United States Supreme Court, in the case of Leisy vs. Hardin, 135 U. S. 159, said: "The general and unrestricted sale of intoxicating liquors tends to produce idleness, disorder, disease, pauperism and crime." This same court declared the standard of the common law to be the safety, peace, health and morals of the people. The question, then, is, do idleness, disorder, disease, pauperism and crime meet the approval or disapproval of the standard? The reader may think and answer according to his own judgment.

RIGHT IS THE RULE OF THE COURT OF KING'S BENCH

Chief Justice Coleridge said: "Nine-tenths of all the criminals that come before the court are made criminals by the saloon. If we could make England sober, we could shut up nine-tenths of her prisons." Is the business that makes nine-tenths of the criminals in England right or wrong?

THE MISSOURI ESTIMATE OF THE SALOON

The public good is the Missouri test, and the Supreme Court of that State, in the case of the State vs. Bixam, 62 S. W. 828, declares that the liquor traffic naturally breeds disorder and tends to pauperism and crime. Can the public good be advanced by disorder, pauperism and crime?

THE PUBLIC WELFARE IS THE ILLINOIS STANDARD.

In Schwouchow vs. Chicago, 68 Ill. 444, the Illinois Supreme Court estimated the saloon as follows: "We presume no one would have the hardihood to contend that the retail sale of intoxicating drinks does not tend, in a large degree, to demoralize the community, to foster vice, produce crime and beggary, want and misery." If demoralized communities, the fostering of vice and the production of crime, beggary, want and misery are in harmony with the public welfare, then the saloon is lawful at common law, when measured by the Illinois rule; otherwise it is unlawful.

THE SELF-PRESERVATION OF SOCIETY IS THE SOUTH CAROLINA MAXIM

The Supreme Court of that state in State vs. Turner, 18 S. C. 106, said: "Experience has demonstrated that the unrestrained traffic in spirituous liquors is dangerous to the peace and welfare of society." How can we reconcile danger to the peace and welfare of society with its self-preservation?

APPLYING THE HOOSIER YARDSTICK

The Supreme Court of Indiana has declared the common law test to be the public order, the public morals and the public good. In the case of Welsh vs. the State, the same court declares that the unlicensed saloon results in much evil and is detrimental to society; in the case of Haggart vs. Stehlin, 137 Ind. 43, to be dangerous, dangerous to public and private morals and dangerous to the public peace and good order of society; in the State vs. Gerhardt, 145 Ind. 439, to be fraught with great evil, and to result in the most demoralizing influence upon private morals, and the peace and safety of the public, and, in Sopher vs. State, 80 N. E. 913, as tending to pernicious and evil results.

In order to declare the unlicensed saloon lawful at common law, we are required to harmonize its character and natural effects with the public order, public morals and public good. Who can do it?

THE ENGLISH CONCLUSION

Blackstone's rule is the rule of right. It is surely not an unfair test, from the English viewpoint, to measure the saloon by Blackstone's gauge and Gladstone's estimate. Gladstone said: "The saloon is a curse, which inflicts more and greater calamities upon the world than the three historic scourges of war, pestilence and famine combined." Shall we say that the infliction of such calamities is right or wrong?

THE INEVITABLE LOGICAL ANSWER OF THE INDIANAPOLIS NEWS

The proposition of the Indianapolis News is, "That no man has any kind of a right to do that which is wrong." How does the News estimate the saloon? We need not accept the conclusion of the News as to the common law right of the beverage saloon to exist as binding, but, as reasonable men, we can apply its rule to its own estimate and ascertain, for ourselves, what the logical conclusion shall be.

The News has editorially said: "The saloon, as it is now conducted, has no sense of obligation to the public; no appreciation whatever of the duties of citizenship; it buys away from and uses against the people their own police force; it sets itself above the law and against the law; it corrupts politics; it debauches government; it is itself a center and source of lawlessness and disorder; worse than that, it assumes to be an agency of government itself; it arrogates to itself powers that belong only to the people and thereby makes war upon the people."

We are dealing with the saloon as it is now conducted, not as it is not. Then, applying the test of the News, we are to answer, is it wrong for it to have no sense of obligation to the public; is it wrong for it to have no appreciation whatever of the duties of citizenship; is it wrong for it to buy away from and use against the people their own police force; is it wrong for it to set itself above the law and against the law; is it wrong for it to corrupt politics; is it wrong for it to debauch govern-

ment; is it wrong for it to be a center and source of lawlessness and disorder; is it wrong for it to assume to be an agency of government; is it wrong for it to arrogate to itself powers that belong only to the people, and is it wrong for it to make war upon the people? If not, then we should apply Longfellow's statement, "Things are not what they seem." We might even make it stronger than that, and say, *"Things are not what they are."*

CHAPTER V

THE PURPOSE OF CIVIL GOVERNMENT DETERMINES CONSTITUTIONAL AND COMMON LAW STANDARDS

In the preceding chapter, attention has been called to certain specific statements of the common law standard, and, yet, each of the statements is very broad and comprehensive, sufficiently so, perhaps, to cover the entire scope of the common law. The standard of the constitution and of the common law may be ascertained by determining the purpose of the state, for it would be an anomalous situation, if a state can be instituted for a given purpose, and yet its constitution and common law may be legitimately administered contrary to that purpose. The sages of the law have always taught that civil government has its foundation in the moral law; that its purpose is to enforce between man and man the principles of the moral law.

In reasoning to this purpose, the standard law writers start with man in a state of nature, that is, at a time ante-dating civil government, the period when the conduct of men toward each other was regulated and controlled by their own sense of right and wrong, or, as the law writers say, their sense of obligation and responsibility under the moral law.

Walker's American Law, Chapter II, says:

"Individuals, in this condition, are under no other restraint, than that which results from an apprehension of the consequences which follow from con-

formity or non-conformity to the laws of nature; in other words, their conduct is regulated by a sense of *moral obligation* alone. Having as yet contracted no engagements with one another, each individual is in a state of complete *personal independence;* and since no man can as yet have acquired any rights which nature does not vouchsafe equally to all, it follows, that, in a state of nature, there is a perfect *equality of rights and obligations.* And this is the only equality that would exist; for we cannot suppose that any two individuals would be absolutely equal in point of fact, either physically or intellectually. The only equality that can exist among men is a *moral equality,* or an equality of *rights and obligations*; and this is a fundamental condition of the state of nature.

"Such being the relations of men in a state of nature, we may safely conclude that they could not long continue in this primeval condition. A community of angels might need no other restraint upon their actions; but constituted as men are, the moral obligations of a state of nature would not be sufficient to maintain harmony and order. To hinder the strong from oppressing the weak, and prevent might from trampling upon right; in a word, to avoid the nameless evils of *anarchy,* something more than a *moral government* would be found indispensible."

ORIGIN OF CIVIL GOVERNMENT

But something more than the moral law and a moral government was made necessary, not by

reason of any deficiency in the moral law, or the law of nature, but because of the imperfections of man.

The only thing that civil government was ever intended to add to the *equality of rights and obligations* of the moral law is the power or means of enforcement. It is not the province of civil government either to enlarge or limit the natural or moral rights of man, but merely to maintain and enforce them.

It follows, then, that right and wrong are not creations of the constitution, or of the common law or of the enactments or judgments of the civil law, but they are to be determined by the moral law, the law of the equality of rights and obligations among men. *Right* is action in harmony with this law and *wrong* is action in violation of it.

In the case of Moore vs. Strickling, 50 L. R. A. 279, the Supreme Court of West Virginia, quoting approvingly from Judge Dillon's Commentaries on the Laws and Jurisprudence of England and America, says: "The moral law is the eternal and indestructible sense of justice and right, written by God on the living tablets of the human heart. The moral law holds its dominion, by divine ordination over us all, from which escape or evasion is impossible.

"If all people were truly moral, human laws and government would be unnecessary; for the laws of nature written in their hearts, and perfectly understood by them, would be a sufficient guidance in their dealings with each other. Where no wrongs are committed there exists no necessity for punishment, compensation, or restitution, and human

enactments in relation thereto become obsolete. No man need say to his neighbor, "Know the law"; for all would know it, from the least unto the greatest. But where society is constituted on such an immoral basis as to continually increase the wants and arouse the selfish propensities of mankind, and yet render them proportionately harder of attainment and satisfaction, human law becomes of increasing necessity, to suppress and control these wants and propensities for the common good, otherwise a state of immoral anarchy would be the result, deserving the just condemnation, at once requiring his extinction, that 'the imaginations of a man's heart are evil continually from his youth up." The morality of our laws is the morality of the Mosaic interpretation of the Ten Commandments, modified only as to the degree or kind of punishment inflicted."

The Mosaic interpretation of the Ten Commandments, while negative in form, is positive in substance, and is founded upon absolute and perfect justice between man and man; in other words the moral law, the law of equality of rights and obligations between man and man. It is founded on the broad, fundamental principle that no man belongs wholly to himself or has the absolute right to do as he pleases either with himself or his property, unless he pleases to do right, but that he holds his body, mind, soul and property of every description subject to the prohibition of the moral law—that he must not so use them as to invade the law of the equality of rights and obligations among men.

Blackstone, in his Commentaries, page 41, says:

"If our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, . . . we should need no other guide. . . . But every man now finds the contrary in his own experience—that his reason is corrupt and his understanding full of ignorance and error."

IT IS NOT THE PURPOSE OF CIVIL GOVERNMENT TO CREATE OR GRANT RIGHTS

We are often confused in constitutional interpretation, by indulging the supposition that the rights of citizens are created or granted by the constitution, when, in fact, the only object of a constitution is to provide an agency of preserving and protecting rights previously existing. The constitution is the source of power to those who govern, not to those who are governed.

In Atchison, Etc., Ry. Co. vs. Baty, 6 Neb. 37, the court said: "Written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former.

"A constitution measures the powers of the rulers, but it does not measure the rights of the governed; it is not the origin of rights or the fountain of the law. The design of the constitution is to protect the absolute, natural rights of the individual."

John Locke says: "The end of government is the welfare of mankind."

Huxley said of Locke's definition: "That is the noblest, and, at the same time, the briefest definition of the purpose of government known to man."

Plato said: "The public good is the object of the state."

Gladstone said: "The purpose of government is to make it as hard as possible to do wrong and as easy as possible to do right."

BYNUM'S DEFENSE OF THE SALOON.

Ex-Congressman W. D. Bynum, in the Indianapolis Star, October 21, 1907, says: "Constitutions are not the sources of rights and privileges; they are simply instruments by which pre-existing rights are preserved and protected, and neither a provision of the Constitution or any legislative enactment can confer upon any citizen any natural right to which he is not rightfully entitled."

To all of which, the writer most heartily assents. It is the function of the constitution to provide a means of preserving and protecting pre-existing natural rights. The preservation and protection of natural rights necessarily includes the prohibition and prevention of natural or moral wrongs.

And, it being the purpose of government, as Mr. Bynum says, to preserve and protect natural or moral rights, it also follows, as he asserts, that no legislative enactment can confer upon any citizen any natural right to which he is not rightfully entitled; in other words, no legislative enactment can change a natural or moral wrong into a natural or a moral right, and, therefore, into a legal right. A legislative enactment may certainly attempt to do so, and the inevitable conclusion of Mr. Bynum's argument is, that the enactment itself would be null and void, and to this we agree.

So, according to this theory, to determine the legal status of the saloon, we have to ascertain only whether it is a natural right or a natural wrong. If a natural right, then it is a legal right, and is entitled to the preservation and protection of the government. If it is a natural wrong, then it is a legal wrong, and can not be protected legally by a legislative enactment.

Mr. Bynum believes that the saloon is a natural right, and, therefore, lawful under the constitution and the common law. The writer believes that the saloon is a natural wrong, and, therefore, unlawful under the constitution and the common law, and thereby prohibited, if they be enforced.

Mr. Bynum further says: "The courts have taken advanced grounds upon the liquor question within recent years, no doubt from necessity, owing to changed conditions. They have pronounced it an evil without one redeeming feature; a nuisance in any habitation fit to reside in; as inimical to society; the propagator of crime and the dispenser of untold misery and suffering." Mr. Bynum approves these pronouncements of the courts, and yet contends that the saloon is a natural right. His position may be thus stated: He believes that that which is an evil without one redeeming feature is a natural right, and that it is the object of the constitution and the common law to preserve and protect it; he believes that that which is a nuisance in any habitation fit to reside in is a natural right and that the constitution was ordained and the common law

adopted to preserve and protect it; he believes that a menace to society is a natural right and that it is the object of the constitution and the common law to secure that right; he believes that the propagation of crime is a natural right and that, to the end that its propagation might ever continue, the constitution and the common law were established; he believes that the dispensation of untold misery and suffering is a natural right and that it is the purpose of the constitution and common law to safeguard the right to dispense agony and sorrow.

On the other hand, it is the position of the writer, that an evil without one redeeming feature is a natural wrong and that it is the purpose of the constitution and the common law to prevent and prohibit it; that that which is a nuisance in any habitation fit to reside in is a natural wrong and that it is the purpose of the constitution and the common law to abate it; that a menace to society is a natural wrong and that it is the purpose of the constitution to prevent and prohibit it; that the propagation of crime is a natural wrong and that it is the purpose of the constitution and the common law to destroy it; that the dispensation of misery and suffering in any degree is a natural wrong and that it is the purpose of the constitution and the common law to alleviate misery and suffering. As between the two positions, we invite the intelligent reader to take his choice.

The theory that the *equality of rights* is the basis of civil government is no new doctrine. The revo-

lutionary fathers announced and immortalized it in the Declaration of Independence, when they asserted that all men are created equal, endowed with certain inalienable rights, and that to secure these rights governments were instituted among men. Government is, then, in a sense, an institution of God, designed and intended to preserve and protect the equality of the rights of men, or, putting it in other words, to enforce the natural or moral law. But the moral law can be enforced upon its own standard only. Not on some other standard.

If this be true, the people, in the administration of civil government, have no choice between right and wrong. God has made the choice for them and no policy of civil government can be harmonized with the purpose of organized society, unless it be directed to the enforcement of the right upon one hand, and to the prohibition of the wrong upon the other.

In Gulf, etc. R. Co. vs. Ellis, 165 U. S. 150, the United States Supreme Court, speaking by Justice Brewer, said: "The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident; that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases ref-

erence must be had to the organic law of the Nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

In United States vs. Cruikshank, 92 U. S. 542, the same court said: "The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power." And, in Yick Wo vs. Hopkins, 118 U. S. 356, it was said: "That the guaranty of the equal protection of the laws is a pledge of the protection of equal laws." We repeat that the purpose of civil government must necessarily determine constitutional and common law standards. This standard has been declared to be the protection and preservation of the equality of rights. Its function is to operate upon conduct so as to prevent any man from doing any act or following any pursuit that inherently invades this equality of rights.

On November 15, 1907, the Indianapolis News said: "The liquor traffic has become a usurper in our political life and a menace and nuisance in many social relations." And on the 13th day of November, 1907, the News styled the saloon: "This inherently lawless traffic." If so, can it be lawful, when

measured by the rule of the equality of rights among men? If not, how can an inherently lawless traffic be made lawful without invading the principle of the equality of natural rights?

If it be the purpose of civil government to provide a means of enforcing the moral law, it inevitably follows that the standard of the moral law and the standard of the civil law are one and the same. The moral law can be executed only by recognizing its own standard, not by substituting something different for it.

It follows, therefore, that the saloon can not be morally wrong, and yet, legally right, as some assert. If one moral wrong may be a legal right, then every moral wrong may be a legal right. Not only that, but every moral right may be a legal wrong. Such a position is contrary to sense and reason. It is contrary to the philosophy of Abraham Lincoln and especially his Cooper Institute Speech, in which he said:

"Holding, as they do, that slavery is morally right and socially elevating, they can not cease to demand a full national recognition of it, as a legal right and a social blessing.

"Nor can we justifiably withhold this on any ground, save our conviction that slavery is wrong. If slavery is right, all words, acts, laws, and Constitutions against it, are themselves wrong, and should be silenced and swept away. If it is right, we can not justly object to its nationality—its universality; if it is wrong, they can not justly insist upon its extension—its enlargement. All they ask we could readily grant, if we thought slavery right; all we

ask they could as readily grant, if they thought it wrong.

"Their thinking it right, and our thinking it wrong, is the precise fact upon which depends the whole controversy. Thinking it right, as they do, they are not to blame for desiring its full recognition, as being right; but thinking it wrong, as we do, can we yield to them?"

CHAPTER VI

CONSTITUTIONAL AND COMMON LAW STANDARDS ARE PERMANENT, BUT COURT OPINIONS OF THEM ARE CHANGEABLE AND SHOULD BE PROGRESSIVE

Constitutional and common law standards, being determined by the purpose of government, are necessarily, by reason thereof, fixed and permanent. The purpose of government does not change, but remains as designed at its institution.

Alexander Hamilton said: "Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit."

Justice, the equality of rights and obligations among men, is ever the same. In the struggle to attain this end, there has been the never-ending contention between the various elements of society in reference to legislation and court decisions. The enactments of the legislature and the decisions of courts indicate very clearly that both legislative enactments and judicial opinions change, but the end of government is always the same. The standard of the constitution and the common law, justice, the equality of rights and obligations among men, is the same, yesterday, to-day, and forever.

When a court changes its opinion upon a question, it does not thereby change the law, but only its own view of the law.

In Haskett vs. Maxey, 134 Ind. 182, the Supreme Court of Indiana said: "Courts of last resort are

often constrained to change their rulings on questions of the highest importance. When this is done, the general rule is that the law is not changed, but that the court was mistaken in its former decision."

We are accustomed to speak of court decisions as the law, when, in reality, they are merely the court's opinions of the law. They may be in harmony with the law and they may not.

In Kellum vs. the State, 66 Ind. 588, the Supreme Court of Indiana, in 1879, held that lottery gambling by the Vincennes University was a vested right under its charter, granted by the territorial legislature of 1807, notwithstanding the fact that section 8 of article 15 of the constitution of the state, adopted in 1851, reads: "No lottery shall be authorized; nor shall the sale of lottery tickets be allowed."

In 1883, the same court in the State vs. Woodward, 89 Ind. 110, overruled the decision in the Kellum case, and held that lottery gambling could not be legalized in Indiana. In the Kellum case, the court measured the constitutional provision by an enactment of the legislature, and decided that the constitution was itself unconstitutional. In the Woodward case, the court measured the legislative enactment by the constitution, and held the enactment to be unconstitutional. The constitution did not change between 1879 and 1883, but the court changed its opinion of the constitution.

From the organization of the state until 1899, the Supreme Court of Indiana, in an unbroken line of at least a dozen decisions, held that, to constitute the crime of false pretenses, the pretense practiced must be such that a man of ordinary caution and pru-

dence would give credit. The effect of this ruling was to grant to only the strong and prudent the protection of the law, while, in truth, the equality of rights and obligations among men, can only be preserved by granting to the simple and credulous the same protection as is given to the strong and astute and by guarding the ignorant, inexperienced and unsuspecting against the wiles, arts and tricks of the strong and unscrupulous.

In 1877, a circuit judge in Indiana, called attention to the fallacy of the holdings of the Supreme Court, and suggested that the doctrine it advanced would enable almost any confidence man to escape. Clifford vs. State, 56 Ind. 245.

For announcing dissent from the holding of the Supreme Court, this circuit judge was by that court severely reprimanded. Twenty-two years later, in Lefler vs. State, 153 Ind. 182, the Supreme Court overruled all of its previous decisions on the question and adopted the rule proposed by this circuit judge, citing as an authority an article written by him and published in a law journal about the time of the decision of the Clifford case.

The law of false pretenses, in Indiana, did not change in 1899, but the Supreme Court, at that time, changed its opinion of the law. Prior to that time, all false pretense cases in the state had been tried according to a rule contrary to the equality of rights and obligations among men, and, if the Supreme Court had continued to follow its precedents, as the head-hunter hunts heads, we would still be trying false pretense cases according to the old rule. It required eighty-three years for the Supreme Court

of Indiana to apply the principle of equal justice in this class of cases, and it required twenty-two years for it to acquire the moral courage to do so, after a circuit judge had admonished it of its error.

While the fundamental maxims and standards of the constitution and of the common law are permanent and should never be departed from, there is a sense in which the constitution is said to be elastic and the common law to be progressive. It is often spoken of as the "Evolution of the Law," but it is, in reality, an evolution of court opinions of the fundamental maxims and standards, and the advancement and progress of courts and judges in making application of them to new conditions or to old conditions, in the light of the progress and change of an advancing civilization.

Speaking of the common law, the court, in People vs. Randolph, 2 Parker Cr. 174, said: "The 'common law' consists of those principles, maxims, usages, and rules of action which observation and experience of the nature of man, the constitution of society, and the affairs of life have commended to enlightened reason as best calculated for the government and security of persons and property. Its principles are developed by judicial decisions as necessities arise from time to time demanding the application of those principles to particular cases in the administration of justice. The authority of its rules does not depend on positive legislative enactment, but on the principles they are designed to enforce, the nature of the subject to which they are to be applied, and their tendency to accomplish the ends of justice. It follows that these rules are not arbitrary in their

nature nor invariable in their application, but from their nature, as well as the necessities in which they originate, they are and must be susceptible of a modified application, suited to the circumstances under which the application is to be made."

As it is the function of the constitution to provide a means of preserving and protecting the natural rights of men, the application of the constitutional standard will vary, according to the courts' views of these natural rights. The views of the courts may be rightfully expected to keep pace with the progress and advancement of society. On this subject, the Supreme Court of Tenn., in Jacob vs. State, 22 Tenn. 493, said: "A few plain and practical rules will do for a wandering horde of savages, but they must and will be much more extensively ramified when civilization has polished, and commerce and arts and agriculture enriched, a nation. The common law of the country will therefore never be entirely stationary, but will be modified and extended by analogy, construction, and custom so as to embrace new relations springing up from time to time from an amelioration or change of society."

The courts do not, as a rule, lead public sentiment, but public sentiment leads the courts. Consequently, no court can safely depend upon an application of a common law standard, made four hundred and fifty years ago, for, to do so, is to blindly ignore the fact that most likely there have been radical changes and advancements in society, justifying and requiring a different application of the standard.

Discussing the Dred Scott decision, in this respect, Abraham Lincoln said: "Public sentiment is

everything. With public sentiment, nothing can fail; without it, nothing can succeed.

"Consequently, he who moulds public sentiment goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed." Public sentiment does even more than this, because it makes statutes possible of enactment and decisions possible of rendition, and this means that the application of constitutional and common law standards depends upon the state of the public mind.

CHAPTER VII

THE SALOON JUDICIALLY DECLARED TO BE A PUBLIC MENACE

In the preceding chapters, we have attempted to make it very clear that, while some courts have declared that the saloon has the same legal basis as the ordinary and useful avocations of life, others have denied the soundness of such a position. And even the courts that have said that the saloon and ordinary and useful mercantile pursuits have the same legal basis, have announced unquestioned legal principles, which, when applied to their own estimate of the saloon, unequivocally establish the proposition that the saloon and the ordinary and useful occupations of life stand upon entirely different legal bases. For instance, the Supreme Court of Indiana has said that the saloon is dangerous, dangerous to both public and private morals and dangerous to the public peace and good order of society, and then says that the saloon has the same legal basis as the business of the dry goods merchant, the groceryman, the hardware merchant, or any other legitimate traffic.

Then, in the same opinion, the court says: "No person has a right to carry on, upon his own premises or elsewhere, for his own gain or amusement, any public business clearly calculated to injure and destroy public morals, or to disturb the public peace."

If a logical application of this legal maxim be made to the saloon, upon the court's own estimate,

the inevitable conclusion must be that no person has a right to conduct a saloon, for his own gain or amusement, upon his own premises or elsewhere, because the court correctly declares that the saloon endangers both the public morals and the public peace.

Then, to put the saloon and the drygoods store upon the same legal basis, we must be able to say that no man has a right to conduct a drygoods store, for his own gain, upon his own premises or elsewhere, which we can not do, for the element of danger to the public morals and the public peace is wholly absent.

The ban upon the saloon is founded upon its inherent dangers. In George vs. Aiken, 26 L. R. A 345, the Supreme Court of South Carolina makes this distinction in the following language: "We can not for a moment believe that the court would have declared an act constitutional that prohibited entirely the sale of corn, cotton, or other ordinary commodities. It is fallacious to argue, in the light of this distinction, so thoroughly sustained by the authorities, that, if the government can take the exclusive control of the liquor traffic, it can do so as to any of the other avocations in life."

In Crowley vs. Christenson, 137 U. S. 86, the Supreme Court of the United States, speaking of the saloon, said: "As it is a business attended with danger to the community it may, as already said, be entirely prohibited."

The element of danger to the public is the ground

of distinction between the saloon and the usual and harmless avocations of life. The saloon may be wholly prohibited because it is inherently dangerous to the public, but the drygoods business, the grocery business and the hardware business can not be wholly prohibited, for the reason that the element of inherent danger to the public is totally wanting.

Government is a protective institution and the self-preservation of society is its paramount purpose. This principle of self-preservation necessarily makes a distinction between that which is inherently dangerous and that which is not, and this discrimination can be enforced only by placing that which is thus dangerous upon a different legal plane from that which is innocent.

When the courts assert that the saloon may be entirely prohibited, and this assertion has been made judicially so often that it would be useless to appropriate the required space to cite the cases, they thereby declare that the saloon comes within the limits of the principle of law that must be invoked in order to justify the complete and absolute prohibition of any pursuit.

In a general way, we have already indicated that the element of danger to the public lies at the very source of the rule of law that will justify the total prohibition of any occupation, but in this connection, we wish to call attention to some of the judicial and other anouncements of the rule. In State vs. Scougal, 51 N. W. 858, the Supreme Court of South Dakota says: "Under the police power vested in the

state, the legislature may regulate, but it can not prohibit or destroy a business, calling or occupation, not necessarily offensive to the senses, injurious to the health, or otherwise detrimental to the public interest; it is only trades, occupations, and pursuits that are, at all times and under all circumstances, necessarily offensive to the community, or injurious to society, that can be absolutely prohibited by legislative action."

The Court of Appeals of New York says: "In order that a trade may be prohibited entirely, the evil must inhere in the trade, so that the trade, whenever, wherever, however and by whomever conducted, will necessarily inflict injury upon the public."

Cooley's Constitutional Limitations say: "Under the police power it is not competent for the state to prohibit the citizen from carrying on any trade, occupation or business that is not offensive to the community, or injurious to society."

Tiedeman in his "Limitations of the Police Power" says: "In order to prohibit the prosecution of the trade altogether the *injury* to the public which alone furnishes the justification for such a law must proceed from the inherent character of the business."

So that, when the courts say that the saloon may be entirely prohibited, they thereby affirm that, by reason of its inherent character, the saloon always and everywhere is dangerous and injurious to the public—that, under all conditions, it is a public menace, a public wrong.

A PUBLIC WRONG CAN NOT LEGALLY BE A PRIVATE RIGHT

Then, the inquiring mind naturally is inclined to ask, can that which is universally conceded to be and generally judicially declared to be a *public wrong* legally be a *private right*? Is such a thing lawful? If so, there is such a thing as a lawful public wrong and injury. Certainly such a conclusion is not a logical deduction. If it is not lawful, then the next question is, can the legislature, by an enactment, make a public wrong a private right? Can a citizen lawfully establish a private trade in a public injury? Certainly not. Can a state legislature authorize the establishment of a trade in a public menace or danger? No, because to do so, would authorize an invasion of both the private and public rights of citizens.

No court has ever, in so many words, said that this may be legally done; they have always asserted the contrary in direct statements; but, when they place an estimate upon the saloon that makes of it a public menace inherently and then say that it is a lawful business, they, by indirection, reverse the direct statement. Courts have upheld and sustained the validity of prohibitory, local option and remonstrance statutes, and always on the ground that the saloon is inherently dangerous to public morals and public order, and, in doing so, they affirm that they judicially know such to be the inherent character of the saloon; they do not require the fact to be charged and proven.

Dealing with the right to arbitrarily exclude a saloon from a township in Indiana and affirming

the right to so do upon the ground that the business is attended with danger to the community, the Supreme Court of Indiana, quoting from Sherlock vs. Stuart, 96 Mich. 193, and Crowley vs. Christenson, 137 U. S. 86, says: "No one possesses an inalienable or constitutional right to keep a saloon for the sale of intoxicating liquor; to keep a saloon for the sale of intoxicating liquor is not a natural right to pursue an ordinary calling; there is no inherent right in a citizen to thus sell intoxicating liquor by retail; it is not a privilege of a citizen of the state or of the United States." This statement analyzed and segregated declares that to keep a saloon for the sale of intoxicating liquors is not:

1. A constitutional right.
2. An inalienable right.
3. An inherent right.
4. A natural right to pursue an ordinary calling.
5. A privilege of a citizen of the state.
6. A privilege of a citizen of the United States.

If it be a right at all, it is certainly of some other kind and springs from some other source. This proposition is surely axiomatic; it proves itself. When the courts deny to the saloon these rights and affirm that it may be wholly prohibited, they, in legal effect, declare it to be a public menace, and from this two other propositions are inevitable:

1. The saloon, being a public menace, is inherently unlawful.
2. Being inherently a public menace, the saloon can not be made a private right by a legislative act.

A wrong is not a lawful right, and it can not be made such by legislative action.

By the use of judical terms, the courts have declared the saloon an outlaw. If it were not so regarded judicially, it could not be unconditionally suppressed.

On September 5, 1907, before the Northwestern M. E. Conference, at Greencastle, Indiana, Governor Hanly said of the saloon: "It is an enemy well worth while. It has great wealth. It is adroit and cunning. It is resourceful. It touches the financial interests of many men. It is desperate. It observes no law, human or divine. It violates legislative enactments and tramples upon the most solemn constitutional inhibitions. The rules of civilized warfare are to it a meaningless jingle of idle words. It is a black flag. It is an outlaw. Its god is Mammon. It has no religion but the greed of gain. No love that the lust of gold does not corrupt. No pity that avarice does not strangle."

On the next day, the Indianapolis News editorially endorsed the statements of the Governor, said it was a "true key note," and added: "In a word, we are dealing with men who are rebels against both the moral and the statute law, men who seek to rule through alliances with corrupt and cowardly politicians. Opposing prohibition and favoring regulation, they yet refuse to be regulated, and violate —with the consent and connivance of men in office —every law enacted to regulate and control the traffic. This is why the people are so thoroughly aroused. It seems to them to be a question whether they or the liquor-dealers shall rule. No one can

study the problem of municipal government in this country without realizing that one of the most corrupting influences in local government is this same liquor traffic."

These statements are merely elaborations of the estimate placed upon the saloon, by the courts, when they affirm that it may be prevented altogether.

On June 25, 1907, the Indiana Supreme Court, while acknowledging that danger and evil to the peace and good order of society attend and inhere in the saloon, held that it was right and legitimate at common law, and incidentally suggested that to think otherwise is to entertain strange and singular views.

On June 26th, the Indianapolis News endorsed the opinion of the Supreme Court and said that its statements were as clear as the axioms of geometry. By endorsing the language of the court and the governor both, the News puts itself in the attitude of affirming that the saloon is a lawful outlaw.

The various statements of the courts, when put together on the basis of reason, mean the same thing.

CHAPTER VIII

THE SALOON IS NOT A CONSTITUTIONAL RIGHT

"No one possesses a constitutional right to keep a saloon for the sale of intoxicating liquor."

The above language has been used by the Supreme Court of Indiana in three different opinions; it has been used by the Supreme Court of the United States and by the Supreme Courts of Kansas and Michigan and possibly others. It is not a mere, idle expression; it means much. It can hardly be regarded as a casual remark. It is nothing more than fair to presume, from the frequency of its use, that the courts intended the full meaning of the statement.

But what is the meaning of the statement? By the method of circumlocution, we may ascertain what the courts have declared to be constitutional rights. Section one of article fourteen of the Constitution of the United States provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

In State vs. Scougal, 51 N. W. 858, the Supreme Court of South Dakota said: "These constitutional provisions are not mere glittering generalities, but constitute sacred guarantees to the citizen that his liberty and his right to the pursuit of happiness shall not be abridged, and his right to his property

shall not be invaded by the legislative power, except so far as authorized by the sovereign power, or by due process of law." What are the privileges and immunities of citizens of the United States, which no state legislature can rightfully abridge or take away?

In Corfield vs. Coryell, 4 Wash. C. C. 380, Justice Washington said: "I have no hesitation in confining these expressions to those privileges and immunities which were, in their nature, fundamental, which belong of right to citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several states which compose the Union, from the time of their becoming free, independent and sovereign, and, considering these privileges, they may all be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety. No proposition is more firmly settled than that it is one of the fundamental rights and privileges of an American citizen to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit."

In the Slaughter-House Cases, Justice Field, commenting upon this language of Justice Washington, said: "This appears to me to be a sound construction of the clause in question. The privileges and immunities designated are those which of right belong to the citizens of all free governments. Clearly, among these must be placed the right to

pursue a lawful employment in a lawful manner without other restraints than such as equally affect all persons."

In State vs. Scougal, the Supreme Court of South Dakota says: "The right of 'enjoying and defending life and liberty, of acquiring and protecting property, and the pursuit of happiness,' includes the right to pursue any lawful calling, occupation, or business, and the right to choose the means of acquiring property and the pursuit of happiness, not inconsistent with constitutional provisions or the rights of others. The term 'liberty,' as used in the constitution, does not mean mere freedom from arrest or restraint, but it means liberty in a broader and more comprehensive sense. It means freedom of action; freedom in the selection of a business, calling, or avocation; freedom in the control and use of one's property, so far as its use is not injurious to the community, and does not infringe the rights of others; freedom in exercising the rights, privileges, and immunities that belong to citizens of the country generally; and freedom in the pursuit of any lawful business or calling selected by him. Of but little value to the citizen could be these provisions of the constitution, if the state, through the legislative power, could, at its mere will and pleasure, deprive him of his right to pursue any lawful business or calling, not offensive or injurious to the community, and which does not interfere with the equal rights of others, and the right to pursue which he has derived from the *common law.*"

SALOON AN UNLAWFUL EMPLOYMENT

All of these declarations are to the effect that it is one of the guaranteed, constitutional rights of a citizen to pursue any lawful business or calling—any business or calling not offensive or injurious to the community. So, when courts declare that the saloon business is not a constitutional right, they thereby affirm that it is not a lawful business or calling, because it is offensive and injurious to the community; that the right to pursue it is not derived from the *common law,* because it is dangerous and destroys the equal rights of others.

Cooley, on Torts, says: "What the legislature ordains and the constitution does not prohibit must be lawful. But if the constitution does no more than to provide that no person shall be deprived of life, liberty or property, except by due process of law, it makes an important provision on this subject, because it is an important part of civil liberty to have the right to follow all lawful employments.

"The following of ordinary and necessary employments of life is a matter of right. Every person has a right to make use of his own labor in any lawful employment on his own behalf. This is one of the first and highest of civil rights."

In Bertholf vs. O'Reilly, 74 N. Y. 509, the court said: "The right to liberty includes the right to exercise his faculties, and to follow a lawful avocation for the support of life."

In re Jacobs, 98 N. Y. 98, the court said: "So, too, one may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person. Liberty,

in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements, are infringements upon his fundamental rights of liberty, which are under constitutional protection."

In People vs. Marx, 2 N. E. Rep. 29, the New York Court of Appeals said: "Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race? Measures of this kind are dangerous, even to their promoters. If the argument of the respondents in support of the absolute power of the legislature to prohibit one branch of industry for the purpose of protecting another with which it competes can be sustained, why could not the oleomargarine manufacturers, should they obtain sufficient power to influence or control the legislative councils, prohibit the manufacture or sale of dairy products? Would arguments then be found wanting to demonstrate the invalidity under the constitution of such an act? The principle is the same in both

cases. The numbers engaged upon each side of the controversy cannot influence the question here. Equal rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power, and impartial tribunals to enforce them."

In Butcher's Union Slaughter-House Co. vs. Crescent City Live-Stock Landing Co., 111 U. S. 746, Justice Field said: "Among the inalienable rights, as proclaimed in the Declaration of Independence, 'is the right of men to pursue any lawful business or avocation, in any manner not inconsistent with the equal rights of others, which may increase their property or develop their faculties, so as to give them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocent in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country, to all alike, upon the same terms. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex, and conditions, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."

In the same case Justice Bradley used the following language: "The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "All men are created equal; that they are endowed by their Creator with certain inalienable

rights; that among these are life, liberty and *the pursuit of happiness.*' This right is a large ingredient in the civil liberty of the citizen."

In the Slaughter-House Cases, 16 Wall. 116, Justice Bradley said: "This, it is true, was the violation of a political right; but personal rights were deemed equally sacred, and were claimed by the very first Congress of the Colonies, assembled in 1774, as the undoubted inheritance of the people of this country; and the Declaration of Independence, which was the first political act of the American people in their independent sovereign capacity, lays the foundation of our national existence upon this broad proposition: 'That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' Here again we have the great three-fold division of the rights of freemen, asserted as the rights of man. Rights to life, liberty and the pursuit of happiness are equivalent to the rights of life, liberty and property. These are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all; and these rights, I contend, belong to the citizens of every free government.

For the preservation, exercise and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman.

This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed."

The consensus of all these statements is that the pursuit of any lawful business is a constitutional right, yea, more than that, the pursuit of a lawful business is more than a mere right; it is property that can not be taken from him without due process of law. Hence, when the courts declare that the saloon is not a constitutional right, that is merely another way of saying that the saloon is an unlawful institution; that it is not lawful at common law. It is saying that pursuits that are lawful at common law are constitutional rights, and that those pursuits that are not constitutional rights are unlawful at common law. And it means also that a business that may be arbitrarily and wholly prohibited is both unconstitutional and unlawful at common law, and, as the saloon may be absolutely prohibited arbitrarily it is both unconstitutional and unlawful at common law. This is the full meaning of the statement that no one possesses a constitutional right to keep a saloon.

CHAPTER IX

THE SALOON IS NOT AN INALIENABLE RIGHT

What are *inalienable* rights?

The Standard Dictionary says: "Inalienable" means "Not transferable; that can not be rightfully, properly or legally sold, conveyed or taken away."

The courts say: "No one possesses an inalienable right to keep a saloon for the sale of intoxicating liquor." Why? The Declaration of Independence says: "All men are created equal; they are endowed by Almighty God with certain inalienable rights, among which are life, liberty and the pursuit of happiness." The United States Supreme Court has said that, among these inalienable rights "is the right of men to pursue any *lawful* business." Justice Bradley of that court said: "I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States, of which he can not be deprived without invading his right to liberty within the meaning of the constitution."

Liberty is an inalienable right. Liberty, within the meaning of the constitution, includes the right to follow any lawful business or calling. The pursuit of a lawful business or calling is, therefore, an inalienable right. The saloon is not an inalienable right, therefore, it is not a lawful trade or calling; it is not one of the civil or equal rights of men. A business that may be prohibited entirely can not be an inalienable right. The saloon may be prohibited entirely and arbitrarily, therefore, it is not an in-

alienable right. A business that is not an inalienable right, may be wholly prohibited. The saloon is not an inalienable right, hence it may be prohibited altogether.

In the language of Justice Field: "Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give them their highest enjoyment."

When the courts deny that the saloon is an inalienable right, they in effect, declare that it is not conductive to the happiness of mankind; they affirm that it is dangerous to and destructive of the happiness of citizens; and, being so, the saloon is unquestionably unlawful at common law.

The plainest and, perhaps, the most easily understood definition of *inalienable rights* is that of Justice Bradley, in Butcher's Union Co. vs. Crescent City Co., 111 U. S. 746, in the following language: "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen."

Accepting this language as correct, the saloon is

not one of the common occupations of life, and it is not one of the common occupations of life, because it is harmful to society. It is not an inalienable right, because it is not one of the lawful callings of life; it is not protected by the "liberty" and "pursuit of happiness" clauses of the Declaration of Independence and of the Constitution. And, as it is not an inalienable right, it is not a constitutional right. Men have inalienable rights to do right, but no person can have an inalienable right to do a wrong.

CHAPTER X

THE SALOON IS NOT AN INHERENT RIGHT

"There is no inherent right in a citizen to thus sell intoxicating liquor."

The United States Supreme Court has used this expression no less than twelve different times and almost every state supreme court of the Union has declared that no person has an inherent right to keep a saloon. The cases in which such declarations have been made are so numerous that it would be a test of time, eyes and digests to collect and cite all of them, and to do so would serve no useful purpose. It is sufficient to say that the declaration has been made by the Supreme Courts of the States of Indiana, Illinois, South Carolina, Idaho, Colorado, Michigan, Louisiana, Oregon, Missouri, Iowa, Virginia, Alabama, South Dakota, Arkansas, Delaware, Kansas, Georgia, Pennsylvania, New York, North Carolina, New Jersey, Maryland, District of Columbia, and perhaps others.

As illustrative of their import, the case of Harrison vs. People, 222 Ill. 150, is a good example. In this case the Supreme Court of Illinois said: "It must be conceded that the business of keeping a saloon or dramshop is one which no citizen has a natural or inherent right to pursue."

In the opinion of this court, it is so apparent that no one has an inherent right to keep a saloon, that the assertion is regarded as a conceded proposition. But, what is the meaning of the statement? If to

keep a saloon is not an inherent right, why not? What is meant by inherent rights of citizenship? *Inhere* is the key word, and it literally means to stick in, so that inherent rights of citizenship are the rights that stick in and are a part of the very essence of citizenship.

We have gone a long way toward solving the question, when we understand that government is solely a protective institution; that its function is to preserve and protect pre-existing rights, and not to create or grant rights. Citizenship was established and government instituted for the very purpose of promoting and guarding the safety, health, peace, good order and morals of the people, and how could it be possible for that which endangers safety, health, peace, good order and morals to be a part of the essence of citizenship?

Probably no clearer definition of inherent rights can be found anywhere than that embodied in the following statement of Justice Field, of the Supreme Court of the United States: "As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all governmental action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: 'We hold these truths to be self-evident,' that is, so plain that their truth is recognized upon their mere statement, 'that all men are endowed'; not by edicts of Emperors or decrees of Parliament

or Acts of Congress, but 'by their Creator, with certain inalienable rights,' that is, rights which cannot be bartered away or given away or taken away except in punishment of crime; 'and that among these are life, liberty and the pursuit of happiness, and to secure these,' not grant them but secure them, 'governments are instituted among men.'"

The Supreme Court of Arkansas says: "All men are created equally free and independent and have certain inherent rights, amongst which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. The right to liberty, the right to acquire, possess and protect property and the right to pursue happiness all include the right to follow and pursue, for the support of life, any lawful trade or pursuit.

"Can there be any doubt that the right of a man to sell food, to purchase, lease and cultivate lands, or to perform honest labor for wages, with which to support himself and family is among those rights, declared in the constitution to be inherent in every man?"

There is an inherent right in every man to follow a lawful business or calling. There is no inherent right, according to court decisions, in any man to keep a saloon. From these premises the conclusion that the saloon is unlawful is certainly inevitable. No court, probably, has more often or more clearly defined *inherent rights* and *inherent powers* than has the Supreme Court of Indiana, which has declared, at least eight different times, that an inherent right or an inherent power is one

that exists independently of any statute and requires no legislative delegation to justify its exercise.

Then, those rights, which are not inherent, do not exist independently of any statute, and they do require legislative delegation to justify their exercise. The Supreme Court of Indiana has three times, if not oftener, said that no person has an inherent right to keep a saloon; so that, no man, independently of the license statute and its legislative delegation, has a right to keep a saloon. If so, then the saloon is a legalized institution.

Discussing this question editorially, the Indianapolis News says: "Men have the same inherent rights to keep saloons and sell liquor that they have to keep bake-shops and shoe-stores and sell bread and shoes."

The statement is to the effect that they have the same inherent right to do the one as the other. The Supreme Court of the United States and, at least, twenty-five different State Supreme Courts have affrmed that no man has an inherent right to keep a saloon. Then, if the bake-shop and shoe-store stand on the same legal footing, as the News asserts, no man has an inherent right to keep either a bake-shop and sell bread or a shoe-store and sell shoes. And then, to apply the holding of the Supreme Court of Indiana, that those rights, which are not inherent, are delegated by statutes, the next conclusion must be that there is some statute delegating the right to sell bread and shoes, as well as liquor.

The liquor statute is very easily found, but the man that undertakes to point out the bread statute

and the shoe statute will be wholly unable to find them.

Every man has an inherent right to follow any lawful calling. The bake-shop and the shoe-store are both lawful callings, therefore, they are both inherent rights. The saloon is always and everywhere attended with injury to the safety, health, peace, good order and morals of the community and is, for that reason, unlawful, and consequently has no inherent right to exist.

CHAPTER XI

THE SALOON IS NOT A NATURAL RIGHT

"To sell intoxicating liquor at retail is not a natural right to pursue an ordinary calling."

The writer can not be consistently charged with entertaining delusions in making this statement, because the language is copied from the opinions of the Supreme Court of Indiana, and this court is perfectly sane at all times—or otherwise. An analysis of the statement undeniably discloses that it is the view of the court that ordinary callings are natural rights, and, as it asserts that the saloon is not a natural right, it thereby affirms that the saloon is not an ordinary calling. If the saloon is not a natural right, it is certainly some other kind of a right, if it can be a right at all. Those rights, which are not natural, are surely created rights. The saloon is not a natural right, because it is not an ordinary calling, and it is not an ordinary calling, because it is harmful and dangerous to society, consequently an unlawful business. As it is not a natural right, because it is unlawful, it can not become a right at all unless it be made lawful, that is, unless it be legalized. The Supreme Court of Arkansas says:

"All rights which appertain to men are of one or the other of two classes, that is to say: 1. Natural rights; or 2. Acquired rights. The former are such as appertain originally and essentially to men, such as are inherent in his nature, and which he enjoys as a man independent of any particular act on his side. The latter, on the contrary, are those which

he does not naturally enjoy, but are owing to his own procurement. The right of providing for one's preservation is of the first class."

Then, the saloon is not one of those rights inherent in the nature of man; it is not a right of providing for one's preservation; but it belongs to the class designated as procured or acquired rights. And from whence acquired? From the saloon license statute. So, that the effect of the position of the Supreme Court of Indiana, is to affirm that the saloon is a legalized pursuit.

Discussing *natural* rights, Blackstone says: "This doctrine, which before was slightly touched, deserves a more particular explication. Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural *duties* receive any stronger sanction from being also declared to be duties by the law of the land."

The United States District Court, of Arkansas says: "Every citizen and freeman is endowed with certain rights and privileges, to enjoy which no written law or statute is required. These are fundamental or natural rights, recognized among all free people."

The saloon is not one of these fundamental or

natural rights, therefore, to enjoy the privilege of keeping a saloon, a law or statute is required.

From all this two propositions are logically deducible:

First—That, in the absence of legislative approval, the saloon is unlawful.

Second—That, the saloon license statute, instead of restricting or limiting a natural and lawful right, is the means of legalizing a natural wrong.

CHAPTER XII

THE SALOON IS NOT A PRIVILEGE OF A CITIZEN OF THE STATE OR OF THE UNITED STATES

The Supreme Court of the United States, the Supreme Court of Indiana and the Supreme Courts of other states have said: "To keep a saloon is not a privilege of a citizen of the state or of the United States."

The only responsibility that the writer has had in connection with this announcement has been to make an honest effort to ascertain its meaning, and then to attempt to enforce it. Why is the keeping of a saloon not a privilege of a citizen of the state or of the United States? If it is not, there must be some good reason for it.

The Declaration of Independence affirms the equality of man, that is, the equality of rights, and also that the rights of life, liberty and happiness belong to all men alike, on account of this equality, not by virtue of any governmental grant, but by the endowment of God. The first Section of the fourteenth Article of the United States Constitution provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." The "liberty" and "pursuit of happiness" clauses of the Declaration of Independence, and the "liberty" and "property" clauses of the foregoing

provision of the Constitution have been construed by the Supreme Court of the United States and by the Supreme Courts of many states to include the right to follow any lawful pursuit or trade.

The courts have said that *liberty* does not alone mean exemption from physical restraint or imprisonment, but that it also embraces the privilege of pursuing any lawful occupation; that the pursuit of happiness involves the privilege of conducting the ordinary vocations of life, so that man may support himself and family; and that property is not limited to physical property but extends to and includes the privilege of following a lawful, chosen calling.

In the Butcher's Union, etc., Co. vs. Crescent City, etc., Co., 111 U. S. 746, the court declared that a monopoly of one of the ordinary callings of life is unlawful, and, therefore, an abridgement of the privileges and immunities of citizens of the United States within the meaning of the Constitution.

Justice Bradley said: "I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States.

"I hold it to be an incontrovertible proposition, of both English and American law, that all *mere* monopolies are odious and against common right.

"Monopolies are the bane of our body politic at the present day. In the eager pursuit of gain they are sought in every direction. They exhibit themselves in corners in the stock market and produce market and in other ways. If, by legislative enactment, they can be carried into the common avoca-

tions and callings of life, so as to cut off the right of the citizen to choose his avocation, the right to earn his bread by the trade which he has learned; and if there is no constitutional means of putting a check to such enormity, I can only say that it is time the Constitution was still further amended.

"I hold that a legislative grant, such as that given to the appellees in this case, is an infringement of each of these prohibitions. It abridges the privileges of citizens of the United States; it deprives them of a portion of their liberty and property without due process of law and it denies to them the equal protection of the laws.

"In my opinion, therefore, the law which created the monopoly in question did abridge the privileges of all other citizens, when it gave to the appellees the sole power to have and maintain stock landings and slaughter-houses within the territory named, because these are among those ordinary pursuits and callings which every citizen has a right to follow if he will, subject of course, to regulations equally open to all.

"2. But, if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him, to a certain extent, of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen. And if a man's right to his calling is property, as many maintain, then those who had already adopted the prohibited pursuits in

New Orleans, were deprived, by the law in question, of their property, as well as their liberty, without due process of law.

"3. But still more apparent is the violation, by this monopoly law, of the last clause of the section 'No state shall deny to any person the equal protection of the laws.' If it is not a denial of the equal protection of the laws to grant to one man or set of men, the privilege of following an ordinary calling in a large community, and to deny it to all others, it is difficult to understand what would come within the constitutional prohibition."

When the courts say that the saloon is not one of the privileges of citizens they, in effect, assert that it is not one of the ordinary callings; that it is not a lawful pursuit. And they also commit themselves to the proposition that, to authorize any unlawful pursuit, is an abridgment of the privileges of citizens of the United States and of the several states. They are equally firm in holding to the proposition that, to deny to any man the right to pursue any lawful calling is an abridgment of such privileges and immunities, and also a denial of the equal protection of the law.

Courts deny that the saloon is one of the privileges or immunities of citizens, guaranteed by the 14th amendment, and this denial, taken in connection with their construction of this amendment, means that to keep a saloon is not liberty; that it is not the pursuit of happiness; that a saloon is not property within the meaning of the constitution; and that it is an unlawful business.

Dealing with and denying the contention that the

saloon is one of the privileges of a citizen, which should be equally open to all, and one which can not be withheld without denying the equal protection of the law, the Supreme Court of Maryland said: "Any person is at liberty, without governmental grant, to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others.

As the saloon is the prime cause of the habit of drunkenness, and the evils attendant upon drunkenness have always received a considerable degree of attention from the law-making power, when we consider the poverty, misery, ruin and wretchedness, which intoxication entails upon its unhappy victims; and the unspeakable woes which must be endured by helpless and innocent beings dependent upon them; and also the frequent crimes and disorders produced by the same cause, we may readily see why the beverage liquor traffic is not one of the privileges of a citizen; but that it is an evil which the legislature may restrict or entirely prohibit. No one can claim as a right the power to sell, either at any time, or at any place, or in any quantity."

It is not a privilege, because it is an evil, a wrong, an injury to society, the producer of woe, misery, disorder and crime.

RESUME OF THE JUDICIAL DENIALS OF THE RIGHT TO KEEP A SALOON

In this, and preceding chapters we have discussed seriatim the judicial denials of the right to keep a saloon, and we find that the courts have adjudged that no person has a constitutional, an inalienable, an inherent or a natural right to keep a saloon, and

that, to do so, is not a privilege of a citizen, either of the state or of the United States. An investigation discloses that the courts have asserted, and repeated it over and over, that every man has a constitutional, an inalienable, an inherent and a natural right to follow any lawful calling and that to do so, in his own way, without governmental grant, is the privilege of any citizen.

So, then we are driven inevitably to the conclusion that the saloon has none of these rights or privileges, because it is an unlawful occupation. In arriving at the conclusion that the saloon is unlawful, by what law have the courts measured it? Surely by the law embodied in the purpose of government; the law of justice; the law of the equality of rights; the law of the public good; the common law. All of which is well summed up by the Supreme Court of Illinois, in People ex. rel vs. Creiger, 138 Ill. 148, in the following language:

"The right, therefore, to engage in this business and to be protected by law in its prosecution can no longer be claimed as a common law right. But it is a right that can be exercised only in the manner and upon the terms which the statute prescribes. The refusal to grant a license deprives no man of any personal or property rights, but merely deprives him of a privilege which it is in the discretion of the municipal authorities to grant or withhold. It also follows that to adopt the policy of prohibition requires no affirmative act on the part of the authorities authorized to provide for granting licenses. Mere non-action on the part of the authorities results in prohibition."

The estimates placed upon the saloon by the Supreme Courts of Colorado and Idaho serve to emphatically demonstrate its standing, when measured by the law of the public welfare, as is disclosed by the following: "That business is looked at very differently from the ordinary avocations of life. That the right to sell liquors is not an inherent right of the citizens of the United States is beyond cavil. That plaintiff has not been deprived of any property right without due process of law, or denied any privilege belonging to any citizen of the United States is equally clear. The business of selling intoxicating liquors is not considered as of equal dignity, respectability and necessity as that of the grocery, drygoods or the clothing business."

That the business is not generally judicially accorded the status of a right is clearly illustrated by the following language of the United States Court of the District of Columbia: "The law places barrooms and tippling houses on a footing of tolerance only, and an applicant for license is not to be regarded as a business man proposing to engage in any lawful business."

NON-ACTION PURSUES THE POLICY OF PROHIBITION

How can it be that mere non-action results in prohibition? First—When we measure the saloon by the natural, inherent and inalienable rights of men, and the purpose of government, the security of these rights, the saloon is unlawful. In other words, it is unlawful at common law, and whatever is unlawful at common law is thereby prohibited. Second

—By express statute, in each one of the states, the saloon has been prohibited. By which is meant that each of the states makes it a criminal offense to sell intoxicating liquors for beverage purposes. All of the states, however, except Maine, Kansas, North Dakota, Oklahoma, Georgia, Alabama and Mississippi have appended to their prohibitory statutes provisions authorizing the suspension, by means of a license, of the prohibitory or criminal provisions of these statutes. Any man that sells in any of the states, not named, without securing a license, that is, without securing immunity from the criminal statutes of such state, is a criminal, as much so, as if he were to commit larceny. So that a saloon license is merely a suspension of prohibition.

The saloon keeper must always take the initiative; he must apply to the Board of County Commissioners for an order suspending the criminal statute as to him; an order suspending prohibition; an order adopting the saloon; an order granting him a license; and until he can secure such an order, the prohibition of the criminal statute prevails. There is no necessity of the adoption of prohibition; the crying demand is to stop the adoption of the saloon.

The truth of the matter is, that when God endowed man with the inalienable, natural rights of life, liberty and happiness. He decreed a prohibition against the saloon. When the American forefathers established the United States government to secure these rights, they ordained a prohibition against it, and each of the states has enacted a stat-

utory prohibition against it. The difficulty is that each of these prohibitory statutes, except in seven states, has an appendage authorizing some officer or board, for a license fee, to suspend the prohibition of the statute, and, by that means, adopt the saloon. If this appendage shall be removed from these statutes, we will have complete statutory prohibition in each of the states. A successful operation for appendicitis is all that is required, and, if the constitution shall be interpreted and executed in accord with its express purposes and intents, it will very scientifically perform the operation.

So, the whole saloon problem is merely a question of license or no license. Without a license, there can be no protected saloon. Under such conditions, it is even a statutory outlaw. With the license, it is authorized to exist and is protected; it is a legalized outlaw. The license, whether high or low, is the tap root of the iniquity.

CHAPTER XIII

NO LEGISLATURE CAN BARGAIN AWAY THE PUBLIC HEALTH AND THE PUBLIC MORALS

In State vs. Mississippi, 101 U. S. 814, the United States Supreme Court says: "No legislature can bargain away the public health or the public morals. The people themselves can not do it, much less their servants." If this can not be done, there must be a reason for it. The court gives the reason, when it says: "Government is organized with a view to their preservation, and can not divest itself of the power to provide for them."

They are among the inalienable rights, to secure which governments are instituted among men. Their security being the purpose of government, it necessarily follows that the state can not so divert the exercise of its functions as to expressly authorize their destruction. To do so, would most assuredly be a violation of the first section of Article fourteen of the United States Constitution. "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

The pursuit of happiness has been held to be one of the privileges of a citizen, and happiness has been held to include health, peace, good order, safety and morality. Liberty, the courts say, means not only freedom from imprisonment and physical restraint

but freedom to follow any of the lawful callings of life.

If the saloon were a lawful calling, it would be one of the privileges of a citizen, but the courts say that it is not, therefore, it is surely an unlawful calling. The courts further say that to directly authorize, by legislative enactment, the pursuit of an unlawful calling is an abridgement of the privileges of citizens, a denial of the equal protection of the laws, or rather a denial of the protection of equal laws. Lastly, they assert that the saloon keeper sells because the government has delegated to him the right to sell, and, in view of the other propositions, it would seem to follow as an inevitable sequence that the delegation of the right is unlawful. The conclusion is absolutely unavoidable, unless the intrinsic character of the saloon may overthrow it, and we have discussed this question in almost every preceding chapter. So that the question may be fully foreclosed, we cite a few judicial estimates of the saloon:

Mugler vs. Kansas, 123 U. S. 205:

"It is not necessary, for the sake of justifying the state legislation, now under consideration, to array the appalling statistics of misery, pauperism, and crime which have their origin in the use or abuse of ardent spirits.

"For we cannot shut out of view the facts, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact established by statistics accessible to everyone, that the idleness, disorder, pauperism, and

crime existing in the country, are, in some degree at least, traceable to this evil."

Thurlow vs. Commonwealth, 5 Howard, 504:

"The train of evils which marks the progress of intemperance is too obvious to require comment. It brings with it degradation of character, impairs the moral and physical energies, wastes the health, increases the number of paupers, and criminals, undermines the morals and sinks its victims to the lowest depths of vice and profligacy."

In Goddard vs. President, 15 Ill. 589, the Supreme Court of Illinois says:

"It is not sufficient to say that liquors are property, and their sale is as much secured as that of any other property. Their sale for use as a common beverage and tippling is hurtful and injurious to the public morals, good order, and well-being of society. Playing cards and other gaming instruments, and obscene books, prints and pictures are likewise property; and the same right of sale might as justly be claimed; yet no complaint is made that even the importation as well as the sale is forbidden. When we defend the sale of liquors for the purpose of tippling we surely draw our arguments from our appetites, and not our reason, observation and experience. We may carefully protect the public morals, and the profligate from the evils of gaming, horse-racing, cock-fighting; from the obscenity of prints and pictures; from horses and exhibitions of mountebanks and rope-dancers; from the offensive smell of useful trades and hog-pens; from the manufacture and exhibition of fire-works and squibs; from rogues, idlers, vagabonds, and vagrants, and

from dangers of pestilence, contagion and gunpowder, yet according to the doctrine contended for, this right to vend a slow and sure poison as a common beverage must remain intact and not amenable to police regulations for its suppression, although all the other evils together will not destroy a tithe of the number of human lives, nor produce more moral degradation, or suffering, wretchedness, and misery in the social relations of society; or pauperism, vagrancy and crime in the political community, or pecuniary destitution of individuals and families, than will the constitutionally protected right of destroying our neighbors and fellows for the selfish end of our own individual private gain. I am utterly incapable of so regarding it as above all the claims and interests of society, the peace and welfare of families, and especially above the police powers of government; and shall never be brought to acknowledge the sacredness and inviolability of its rights, until I shall be able to forget all that I have seen, observed, known and experienced of its destructiveness of all that is estimable upon earth. Viewing the great and irreparable mischief growing out of this practice, I am not prepared to say that another *nuisance* may not be added to the list; and that under the police powers society may find protection from its blighting curse."

Transposing this statement slightly, it declares that intoxicating liquor is a slow and sure poison, whose sale for beverage purposes can only be defended by men's appetites, and not by reason, observation or experience; that gambling, horse-racing, cock-fighting, obscenity, rope-dancers,

rogues, idlers, vagabonds, vagrants, pestilence, contagion and gunpowder will not destroy one-tenth of the lives that will the saloon, nor produce, socially, so much moral degradation, suffering, wretchedness and misery, or as much pauperism, vagrancy and crime as the saloon, nor as much pecuniary destitution as the saloon.

Hence, it seems very clear that the inherent character of the saloon and its natural effects surely bring it within the condemnation of the law. If the object of a saloon license be to confer a right that does not exist without the license, as declared by the Supreme Court of Michigan, then it would follow, as surely as the night follows the day, that to grant the license is to bargain away, for the license fee, life, liberty, property and the pursuit of happiness.

If then, there can be any escape from this conclusion, some other subterfuge must be invented and the dispensers of this slow and sure poison are equal to the emergencies of the case and come forward with two means of escape. First—They say that a saloon license is a prohibition, a restriction, a restraint and a regulation of the liquor traffic, imposed upon it by the legislature in the exercise of the police power of the state. Second—Because the saloon is not specifically condemned, that is, by name, in the constitution, it should be held to be constitutional and lawful.

CHAPTER XIV

THE SALOON A LEGALIZED INSTITUTION

"The licensed saloon keeper does not sell liquor by reason of an inalienable right, inherent in citizenship, but because the government has delegated to him the exercise of such rights."

If this expression were original with the writer, some brewery lawyer or subsidized newspaper editor would probably denounce it as the fancied dream of a freak, but it is the declaration of the Supreme Court of South Carolina in State vs. Aiken, 42 S. C. 231. If the statement be correct, it surely follows that the saloon is legalized. Legalize, of course, means to give legal sanction to that which was previously illegal or unlawful.

The Supreme Court of Indiana has five times said: "A saloon license is a *mere* permit." The Indiana Appellate Court has used the same expression. So has the Court of Appeals of New York, the Supreme Court of Massachusetts and the Supreme Courts of several other states. The Supreme Court of Indiana has also said: "The privilege of keeping a saloon is a derivative right, springing alone from the provisions of the license statute."

In three other cases, speaking of a saloon license, the Supreme Court of Indiana, has said: "It is the license itself, properly procured, that confers the right to retail under the statute, and, until it is issued, no such right is conferred." In two different saloon license cases, the Supreme Court of Ohio has said: "A license is a permission, granted by

some competent authority, to do an act, which, without such permission, would be illegal."

Surely, then, the act of selling liquor would be illegal without a license, and, if so, the license certainly legalizes it. In State vs. Frame, 39 Ohio St. 413, the Supreme Court of Ohio said: "A license is essentially the granting of a special privilege to one or more persons, not enjoyed by citizens generally, or, at least, not enjoyed by a class of citizens to which the licensee belongs." This is a saloon license case.

In another liquor license case, the Supreme Court of Ohio said: "The license is a condition precedent to the right to carry on the business."

In Plender vs. State, 10 N. W. 481, it was contended by a saloon keeper that the license established a system of double taxation, in violation of the constitution of the state of Nebraska, and the Supreme Court of that state held against him on the ground that the object of a license is to grant a permission to do an act, which, without the permission, would be illegal, adding: "So, we say, that the prohibition of the traffic is absolute, except upon certain specified conditions, and one of these conditions is the provision for its legalization by the procurement of a license."

In Youngblood vs. Sexton, 20 Am. Rep. 654, a liquor case, which involved the legal distinction between a tax and a license, the Supreme Court of Michigan, speaking by Judge Cooley, said: "The popular understanding of the word, *license,* undoubtedly is, a permission to do something, which without the license, would not be allowable. This

we are to suppose was the sense in which it was made use of in the Constitution. But this is also the legal meaning."

The quotations, heretofore given in this chapter, are from liquor cases. The man who is intent on following precedents is surely justified in concluding that a saloon license is a means of legalizing an unlawful pursuit, a means of granting a privilege —a permission, a means of conferring a new right.

COURTS DO NOT FOLLOW THEIR OWN PRECEDENTS

For several months the Indianapolis News has persistently criticised the writer for refusing to follow the precedent involved in the judgment of the Indiana Supreme Court, that the saloon is not unlawful within itself, and it has charged that the writer has assumed to overrule the Supreme Court. Here, there is a disagreement. The writer contends that the Supreme Court itself does not follow its own precedents, and that the News follows the Supreme Court, when it meanders from its own path.

If the saloon license is a permit, a delegated right, a derivative right, a conferred right, a legal sanction of that, which, without it, would be illegal, a legalization of that which, is, without it, prohibited, as the courts say, it surely follows that the writer is adhering to precedents in contending that the saloon is not a common right, but a special privilege conferred by the license. A common right is not, and can not be the creation of a license. In State vs. Frame, 39 Ohio State 413, the Supreme Court of Ohio says: "A common right is not the creation

of a license." So that, if the saloon is a common right, the license is not a permission or a granted right, but the courts say that it is. And in this, the writer follows the courts, but the News does not.

On April 15, 1907, the News, editorially, said: "The saloon exists, not because the license law permits it to exist, but because the business of retailing liquor is legal."

But, the Supreme Court of Indiana says: "The privilege of keeping a saloon is a derivative right, springing alone from the provisions of the license statute."

There is certainly a disagreement between the News and the Supreme Court, but none between the Supreme Court and the writer on this point.

A PRE-EXISTING RIGHT CAN NOT BE A PERMIT

There can be no such thing, in a legal sense, as a permission to exercise a pre-existing right. Permission implies that the right does not exist without it. In a liquor case, on this very question, the Supreme Court of Ohio, in Adler vs. Whitbeck, 9 N. E. 672, said: "The result of the definitions that have been given of a license, as implied in its etymology, is in conformity with the sense in which the word is ordinarily used, and may be regarded as strictly accurate in all respects. That is permitted that can not be done without permission; and to say a person is permitted—licensed—to do what he may lawfully do without permission, is a misuse of words."

Logically then, if the News be correct, the courts have been making a wholesale misuse of words, and, not only the courts, but also the News itself, for on

November 19, 1907, it editorially styled the saloon, "a business that has been legalized." On November 13, 1907, the News, editorially, referred to the saloon as "this inherently lawless traffic," and on December 12, 1907, it said: "For years the liquor interest has been altogether lawless."

The four statements of the News can be put together, only upon the theory that the News believes that an inherently lawless business, an interest altogether lawless and a business that has been legalized is lawful in advance of legalization. In other words, that there may be lawful lawlessness. The News is the advocate of the doctrine that, if all saloon statutes were repealed, the saloon would be lawful at common law. On April 28, 1906, the News said: "Open saloons on Sunday always bring crime and disorder. The freerer the policy with reference to the saloons the greater the lawlessness." The open saloon on the other six days of the week will assuredly have some of the effects of the open Sunday saloon. As a legal proposition the News affirms that an open saloon twenty-four hours a day and seven days each week is a legal right. It may be the contention of a freak to assert that no man ever had a lawful right, common law or any other kind, to bring crime and disorder upon any community, but this is the position of the writer. And it is the position of the courts, if only they would apply to the saloon the same legal principles that they apply to other inherently dangerous and injurious acts and pursuits.

Then, to license the saloon must have the effect to confer upon it the right of existence, which it did

not previously have. Upon this proposition, in Chilvers vs. People, 11 Mich. 43, a license case, the Supreme Court of Michigan said: "The object of a license is to confer a right that does not exist without a license."

DREAM OF THE INDIANAPOLIS STAR

On April 16, 1907, the Indianapolis Star published an editorial, entitled "Judge Artman's Delusion," in which the Star editor charged that the writer was ignoring all judicial precedents and was assuming to be a law unto himself, and, using his editorial irony, sarcasm and ridicule in the most severe acrimonious tone, he said, among other things:

"Judge Artman furnished a key to his peculiar theory of the regulations of the liquor traffic in a lecture which he delivered at Lebanon on Sunday night. The subject was 'The Legal Status of the Saloon Business.' The substance of his argument, as reported, is summed up in this proposition:

"The object of a license is to confer a right which does not exist without a license. Its function is to create a right, and not to restrict or prohibit an existing right.

"There is not a man in Indiana, lawyer or layman, who will not recognize this proposition as unfounded and preposterous if he will give five minutes to its consideration. Look at a few unquestionable facts.

"The Legislature of 1905 passed a law making it 'unlawful for any person, firm or corporation to buy junk without having first obtained a junk dealers' license.' Did anybody have a right to buy or sell

junk before that law was passed? Is it true that the law created a right, and did not restrict or prohibit an existing right? Answer, ye rag men, ye old clothes men, ye old iron men, ye women of Indiana who have been selling junk for more years than you will acknowledge, and have been buying it for some years past at rummage sales. Is the purchasing of junk a newly created right?

"There have been laws for some years requiring a license for keeping a dog. Had nobody the right to keep a dog until a license law was passed? Is that a newly created right? The Legislature of 1901 and 1905 provided for licensing embalmers. Was there no lawful embalming before then?

"Take another case that has received a large amount of attention. In 1885 the Legislature passed a law providing that no person should 'practice medicine, surgery or obstetrics' in this State without a license. The doctors were indignant. Their business was not only lawful but necessary. They had common law rights, moral rights, scriptural rights."

This exhibition of editorial wisdom is really amusing. The first sentence of the quotation, and the one containing the thought so severely criticised and ridiculed in this editorial, is literally the language of the Supreme Court of Michigan in the Chilvers case. When the editor was gleefully firing his shafts of satire at the writer, he was ignorantly directing the darts of his arrow at the Supreme Court of Michigan. It is clearly not an unfair proposition to say that no cause can have a better legal status than its natural effects.

The Star, in 1906, editorially said: "The masses of the people are coming more and more to the realization of the fact that drunkenness is the one great cause of poverty, misery and crime, beside which all others fade into comparative insignificance."

No truer statement was ever made by any one. The saloon is the one great cause of drunkenness, hence the saloon is the one great cause of poverty, misery and crime, beside which all other causes fade into comparative insignificance. If the saloon be lawful, then the misery and crime, produced thereby, would be lawful also.

We can logically reason by comparison only by selecting likes, not unlikes. In view of the Star's own characterization of the saloon, it should have selected some business that is a very productive source of poverty, misery and crime in its discussion of the purpose of a saloon license.

The Supreme Court of Kansas says: "The saloon is a contagious peril to the peace and good order of society; it weakens, corrupts, debauches and slays human life and human character." For the purposes of comparison, then, we should select a business that is a contagious peril to the peace and good order of society and that weakens, corrupts, debauches and slays human life and human character. Neither the ordinary purchase and sale of junk, nor the keeping of an ordinary dog, nor the emablming of the dead, nor the healing of the sick, does any one of these things, as a natural result.

As relates to a legitimate and useful profession, industry or business, a license may be required as a

regulation, not to confer legal existence, but, as relates to a profession, industry or business that can not be engaged in as a constitutional, common law or moral law right, a license, to engage therein, must be regarded as a conferred privilege.

Under the constitution, the common law and the moral law every one has a common right to impart information, to heal the sick and to cure the tooth-ache without any license, but, when an individual desires to engage in the business of imparting information as a public school teacher, or of healing the sick as a physician or of curing the tooth-ache as a dentist, the state may regulate the business and require of him a license as evidence of his qualifications, to the end that the public may not be humbugged by him. The state may exact a license to prevent humbuggery, in a legitimate trade or profession, but it can not grant a license to permit humbuggery in an inherently unlawful business.

To make a just comparison with the rummage sale, we should have a rummage stock that will produce the same natural results as the saloon. Suppose we select such a stock, and, then, by comparison, reason to the logical and sensible result. We must have a stock that is a contagious peril to society and one that will naturally weaken, corrupt, debauch and slay human character and human life. And so we select a stock of rummage, old clothes, etc., infected with the germs of contagious diseases. Would any sane man, for a second, contend that the legislature of any state could legally authorize the licensing of such a business? Certainly not. Such an act would be an invasion of the fundamen-

tal rights of citizens; it would be bargaining away the public health, and this no legislature can rightfully do; but such a license would no more effectually bargain away the public health than does a saloon license bargain away public health, public morals and public order. A state legislature has just as much legal right to license, for food purposes, the sale of poisoned bread or diseased meat as it has to license the sale of poisoned drinks for beverage purposes, and an intoxicating drink is a poisoned drink.

The Star editor is very unjust to the dog, for the dog, as a species, is not a contagious peril, while the saloon keeper is. However, there is a special type of dog, that belongs in the same class with the saloon keeper, and this type can be appropriately used in comparison with the saloon keeper. A mad dog belongs to the same class. Hydrophobia is a contagious peril. Surely no one would think that the state was not denying to the citizens the equal protection of the laws, if it were to attempt to authorize the licensing of the keeping of mad dogs.

Yet, according to the judgment of the best statisticians, the saloon slays annually one hundred thousand people in the United States, while mad dogs do not slay a dozen.

The editor is equally unfair to the undertaker. The undertaker embalms the dead in the interest of sanitation and health, and this is lawful; but the saloon keeper embalms the living, producing degredation and death, and this is unlawful.

But, the worst of all is to place the family doctor on the same plane with the saloon keeper. The fam-

ily physician is a messenger of peace, of mercy, of relief, of compassion and healing, all of which is lawful; but the saloon keeper is a minister of disease, of suffering, of misery, of anguish, of woe, of shame, of crime, and of death itself, all of which is unlawful. In the case of the physician the license is exacted in order to insure the proper qualification to pursue a useful and lawful calling, while, in the case of the saloon keeper, the license is granted in order to authorize the pursuit of an injurious and unlawful calling.

Distinction Between a License as a Regulation and a License as a Permit

The language of Justice Bradley, of the United States Supreme Court clearly illustrates this distinction. "Licenses may be properly required in the pursuit of many professions and avocations, which require peculiar skill and training or supervision for the public welfare. The profession or avocation is open to all alike who will prepare themselves with the requisite qualifications or give the requisite security for preserving public order. This is in harmony with the general proposition that the ordinary pursuits of life, forming the greater per cent of the industrial pursuits, are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the general good may demand.

All such regulations are entirely competent for the legislature to make and are, in no sense, an abridgment of the equal rights of citizens. But a license to do that which is odious and against

common right is necessarily an outrage upon the equal rights of citizens."

Judge Cooley says of the liquor traffic:

"The business of manufacturing and selling liquor is one that affects the public interests in many ways, and leads to many disorders. It has a tendency to increase pauperism and crime. It renders a large force of peace officers essential and it adds to the expenses of the courts, and of nearly all branches of civil administration." Is a business which does these things odious and against common right? If so, then, its legalization by a license is an outrage upon the equal rights of citizens.

CHAPTER XV

THE SALOON LICENSE IS NEITHER A PROHIBITION, A RESTRICTON, A RESTRAINT NOR A REGULATION OF THE LIQUOR TRAFFIC

Those who insist that it is lawful to license the saloon abandon the declarations of the courts that a license is a delegated right, a mere permit, a derivative right and a conferred privilege, and assert that the license is a limitation upon a common right imposed by the state legislatures in the exercise of the police power of the state.

The Police Power

While not claiming either the ability or the information requisite to a perfect definition of the police power, we may endeavor to convey some idea of its meaning. Civil government is merely the agency adopted by the people for the defense and protection of certain God-given rights,—not rights granted by the government. The police power is merely the power assumed by the people, in the foundation of the government, to accomplish these ends. Government is a protective institution; its function is to preserve and protect men in the enjoyment of the inherent and inalienable rights, with which Almighty God has endowed them. The police power, being one of the powers of the government is necessarily no more than a protective power; its function is to protect the pre-existing rights of men, not to create and grant to certain individuals new rights. It is the power to enforce the right and prohibit the wrong. It is the power to enforce the

chief end of organized government, which is the preservation and development of the good order, the peace, safety, health, morals and welfare of the people. It is the power to enforce the principles of the moral law.

In Boston Beer Co. vs. Massachusetts, 97 U. S. 989, the United States Supreme Court, speaking of the police power, said: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *Salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

So that the object of the police power is the protection of life, health, property, good order and morals, which is the very purpose of government itself.

Judge Cooley's definition of the police power is as follows: "The police power of the state, in a comprehensive sense, embraces the whole system of internal regulations by which the state seeks not only to preserve the public order, and to prevent offenses against the state, but also to establish for the intercourse of the citizens with citizens those rules of

good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as it is reasonably consistent with a like enjoyment of rights by others."

The police power can only be exercised rightfully within the limits of the constitution. It can have no broader scope. It is limited by the fundamental rights of men, announced in the Declaration of Independence and safe-guarded in the fourteenth amendment to the United States Constitution.

Upon this question Judge Cooley says: "It must be within the range of legislative action to define the mode and manner in which one may so use his own as not to injure others, subject to the provisions of the constitutions, state and national, and to those great fundamental principles enunciated in the Declaration of Independence."

Chief Justice Fuller says: "The police power rests upon necessity and the right of self-protection, and fundamental rights can not be invaded under the mere guise of a police regulation."

In Lawton vs. Steele, 152 U. S. 133, the United States Supreme Court said: "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction of a house falling to decay or otherwise endangering the lives of passersby; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of

decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold."

Emphasizing the doctrine that the police power can be exercised only within the limits of the constitution, the New York Court of Appeals said: "At the same time, it must be remembered that the constitution is the supreme law of the land; and that, when an act of the legislature properly comes before the court to be compared by it with the fundamental law, it is the duty of the court to declare the invalidity of the act if it violate any provision of that law."

So that, in determining whether the saloon license statute is a lawful exercise of the police power, we must measure it by the fundamental, inherent and inalienable rights of men proclaimed in the Declaration of Independence. All governmental action should be directed to their security. If the saloon license is a means of making these rights secure, it is in harmony with the purpose of government, but, if it is a means of authorizing an unlawful trade, it can not also be a security of fundamental rights.

And, when the courts say that the object of a saloon license is to confer a right which does not

exist without the license, they thereby affirm that it is an abridgment of the privileges of citizens and a denial of the equal protection of the laws.

Accepting the estimate placed upon the saloon by the courts, in view of their own definition of a saloon license, we can not reason to the conclusion that the license is a means of protecting life, health, liberty, property, morals, peace or good order, so as to establish it as an exercise of the police power.

SALOON LICENSE NOT A PROHIBITION

If the saloon license is a prohibition of the saloon, then all anti-saloon people should favor the license.

Men very frequently are inclined to doubt that any court has ever declared that the saloon license statute is a prohibitory measure, yet the most skeptical individual in this respect needs only to examine the case of Welsh vs. State, 126 Ind. 73, to be convinced that the Indiana Supreme Court has declared that the saloon license is a prohibition of the liquor traffic.

Seven states have adopted the no-license policy on the theory that, in the absence of licenses, they will have prohibition. If a license means prohibition, these states are surely pursuing an unfounded policy. In states, where local option prevails, the temperance people have been waging enthusiastic campaigns to carry the elections against license, in order, as they think, to establish local prohibition, but, if a license means prohibition, they should carry the elections in favor of license in order to prohibit the saloon. In Worth Township, Boone County, Indiana, there had been a licensed saloon continuously

for more than forty years prior to August, 1906. Then, according to the Supreme Court of Indiana and other courts that share its views as to the effect of a license, the inhabitants of this township had enjoyed uninterrupted prohibition for more than forty years. In August, 1906, a majority of the voters remonstrated against the saloon, and withdrew from the Board of County Commissioners the authority to license a saloon for two years, thereby compelling the saloon to close. If a license is prohibition, then the voters of this township abolished prohibition therein by withdrawing the authority of the Board to continue the license. This position seems too absurd for any sensible man to entertain, yet it is solemnly affirmed by Supreme Court Judges, with a very slight modification. They say that the license law prohibits all but the man who holds the license. In the Welsh case, the Supreme Court of Indiana said:

"A license law prohibits all within the state, who have not obtained a license, from engaging in the business of retailing intoxicating drinks.

"There is no difference between an absolute prohibitory law, and a license law, except in the extent to which they prohibit the manufacture and sale of intoxicating drinks." This may be, and probably is, all the difference that there is between them. It is the difference between prohibition and permission. An absolute prohibition law, honestly enforced, will prohibit the traffic entirely, while the license statute will not prohibit in any sense or to any extent, but will nullify and render inoperative prohibitory provisions.

Does a License Prohibit All but the Man Who Holds It?

Suppose we illustrate by the township to which we have heretofore called attention. Since August, 1906, no one in that township has held a license, then, on the basis that a license is a prohibition, there has been no prohibition during that time, but the truth and sense of it is, that, during that time, there has been complete statutory prohibition against every inhabitant of the township. During that time, it has been a criminal offense for any one to sell intoxicating liquor in that township, for a beverage, just as it has been a criminal offense, for any person to commit larceny. This is statutory prohibition. If now, the Board of County Commissioners were to grant a license to some man in this township, they would not thereby impose a prohibition upon all the inhabitants of the township, except the man to whom the license is granted, but they would suspend the prohibition, previously existing against all of the inhabitants of the township, in favor of the man to whom they grant the license. So, then, a saloon license is a suspension of prohibition.

In the Welsh case, the Supreme Court of Indiana, held that the Indiana license statute did not authorize a license to sell liquor on the Ohio River south of low-water mark, but, yet, it held that it was a violation of the criminal statutes of the state to sell at said point. Prohibition at this point was not imposed by the license provision of the statute, but by the criminal, and, in truth, it is the criminal

statutes that impose the only statutory prohibition that here is against the traffic.

Another illustration: Prior to March 12, 1907, it was a violation of the criminal statutes of the state of Indiana for an employee of any railroad company to sell intoxicating liquor on railway trains within the state.

The General Assembly of 1907, passed an act, which became effective March 12, 1907, authorizing the Auditor of State to license, at one thousand dollars per company, saloons in dining cars. This statute did not impose a prohibition upon the companies that would not buy the license, but it did suspend the prohibition, previously existing against all companies, in favor of the ones that buy the license. There is no criminal provision in this act of 1907. Its only purpose and effect is to authorize an exemption and immunity, by means of the license, from the penalties of the criminal statutes of the state.

A LICENSE NEITHER A RESTRICTION NOR A RESTRAINT.

But we meet with a milder proposition in the contention that a license is a restriction and restraint of the liquor traffic,—a limitation upon the free exercise of a common right.

In the absence of a license, it is a criminal offense for any person to sell liquor as a beverage at any time or place. This is complete prohibition and absolute restriction and restraint, all of which is brought about by the criminal provisions of the statute. During eighteen hours of six days in the week, a man, by means of a license, may buy the

privilege of selling liquor, as a beverage, but this privilege is neither prohibition, restriction nor restraint. It is a criminal offense to sell between 11 o'clock p. m. and 5 o'clock a. m. and on Sundays. Between 5 o'clock a. m. and 11 o'clock p. m., on week days, a man may, through a license, secure the right to sell, but this right is not a restriction, nor a restraint, but a permission.

The criminal provisions of the liquor statute restrain, restrict and prohibit, but the license provisions permit and suspend many of the restraints, restrictions and prohibitions of the criminal statutes. Prohibition and permission are antagonistic propositions. Prohibition and delegated rights are antagonistic propositions. In 1873, in the case of Schwuchow vs. Chicago, 68 Ill. 444, it was claimed that a saloon license was a suppression of the business. The court answered this contention by saying: "To suppress must mean to prevent, and not to license or sanction the act to be suppressed. It would be a confusion of terms to say that a thing is suppressed, when it is protected, licensed and encouraged." So, in Indiana, it is a confusion of terms to say that a business is prohibited, when it owes its existence to permits issued by the Board of County Commissioners. Restraint and permission are antagonistic, and likewise are restriction and permission.

INDIANAPOLIS NEWS ON BOTH SIDES

On April 15, 1907, the Indianapolis News accused the writer of entertaining the misapprehension that, to strike down the license provision of the liquor statute, would result in prohibition. It editorially

said: "No express permission is needed for it to exist any more than for any other business. It is sufficient that it be not forbidden. What our Legislature has done is to recognize its existence, and to limit, regulate and restrain it, as far as possible, on the ground that its unregulated and unrestrained existence would be dangerous to the safety and morals of the community."

"The theory, of course, is that, if the license law were repealed prohibition would prevail in the State. It would be difficult to imagine a more foolish proposition. The saloon exists, not because the license law permits it to exist, but because the business of retailing liquor is legal. The license law recognizes an existing institution, one that antedated the law. The Legislature did not 'permit' the saloon, and its withdrawal of the supposed 'permission' would not destroy it."

On the 30th of September, 1907, the News editorially advocated the revocation of their licenses as a punishment of saloon keepers, who sell on Sunday in violation of the criminal statutes. If, as the News said in its previous editorials: "No express permission is needed for it to exist any more than any other business. The Legislature did not permit the saloon, and its withdrawal of the supposed permission would not destroy it. The license is a restriction and restraint of it, a prohibition within certain limits," how can it be possible to punish a saloon keeper by withdrawing and removing a restriction, a restraint and a prohibition against the business? The proposition is a non-sequitur.

The legislature has provided for the revocation of

saloon licenses as a part of the punishment for the violation of certain criminal statutes. The revocation of the license can be a punishment only upon the theory that the license, in the first instance, is a permission, a grant of immunity from the penalties of the criminal statute. It is really amusing to think of a saloon license as a restriction, a restraint and a prohibition of the saloon, and, yet, at the same time, recognize the fact that a saloon keeper, who conducts his business without the restriction, restraint and prohibition of the license, is a criminal. On this theory, when a proposed saloon keeper makes application to the County Board for a license, he does not seek any grant of permission, but he invites the Board to impose a restriction, a restraint and a prohibition upon rights that he already possesses. And, on this theory, he is a criminal, if he exercises his rights, before he secures their restriction, restraint and prohibition in the limitation of a license. These propositions hardly appeal to one's sense of reason as logical. But, when we view the license as a granted privilege, then it is easy to understand why the saloon keeper is a criminal, if he sell without a license, and also to treat the revocation of a license as a punishment.

The saloon keepers themselves are entitled to some consideration as an authority upon the purpose and effect of their license. If they believed that they have a common law right to engage in the traffic and that their license is a limitation upon that right, they would surely be desirous of having the license statute overthrown so that they might avail themselves of their common law right without

such limitation. They would be the warmest friends that the writer has just at this time, and they are, but they are warm in a different sense. They are warm in the sense that a bald hornet is warm. If they regarded the license as a restraint upon their business, they would surely be the most cordial friends of the writer. The story of Damon and Pythias would scarcely be adequate to illustrate the relations between them and the writer, but, alas! Such is not the situation.

In the last few months, the writer has received a large number of anonymous communications from saloons keepers, and not a single one of them has suggested that he desired to be relieved of any restraint imposed upon his business by the license statute. To illustrate their tone, we give the contents of one of them, which is as follows: "You have no more right to take from me the means of earning bread and butter for my wife and children by knocking out the saloon license than I have to burn your house. And, if you do it, a dose of lead pills will be the right thing for you." This is a very clear illustration of the natural lawless and anarchistic tendencies of the business, but it also demonstrates that the saloon keepers do not regard the license as a restraint upon the traffic.

SALOON LICENSE NOT A REGULATION

Regulation and legalization should not be confused, for they do not mean one and the same thing. Legalization means to render legal that which was previously unlawful. Legalization must deal with

prior wrongs, while regulation deals with existing rights. Rights are not subject to legalization, and wrongs are not subject to regulation. Wrongs only can be legalized, and rights only can be regulated. Regulation means to prescribe rules and conditions upon which existing rights may be exercised. To regulate is to methodize.

The statutes providing the place and arrangement of rooms in which licensed saloons may be conducted are regulations, but the statute which authorizes the licensing, the legalization of saloons, is not a regulation. Regulation implies legal existence. Neither are regulation and prohibition the same, because only those pursuits that are inherently unlawful can be wholly and arbitrarily prohibited.

Speaking of this distinction in the Hauck case 38 N. W. 269, the Supreme Court of Michigan said: "*Regulate* and *prohibit* have different and distinct meanings, whether understood in the ordinary and common signification, or as defined by the courts in construing statutes. To regulate the sale of liquor implies that the business may be engaged in or carried on, subject to established rules and methods. Prohibition is to prevent the business being engaged in or carried on entirely or partially. The two are incongruous. To be regulated, the trade must subsist."

If, as the courts say: "The privilege of keeping a saloon is a derivative right, springing alone from the provisions of the license statute," the licensing or legalizing statute is not and can not be a regulation.

In ex parte Garza, 28 Texas Appeals, 381, it was held that "to license" and "to regulate" do not mean

the same thing. To license the saloon is to authorize its operation, while to regulate it is to methodize its operation, after the operation has been authorized by the license.

In Pac. University vs. Johnson, 84 Pac. 706, the Supreme Court of Oregon said: "To license is one thing, and to regulate is another. To license means to permit, to give authority to conduct and carry on; while to regulate means to prescribe the manner in which a thing licensed may be conducted."

There can be no licensing or authorizing of inherently unlawful pursuits without invading and abridging the privileges of citizens.

CHAPTER XVI

HOW TO DETERMINE THE CONSTITUTIONALITY OF LEGISLATIVE ENACTMENTS

The discussion of the legal status of the saloon, in the past few months, has brought forth, from newspaper editors, from lawyers and from some courts, the declaration that the authority of legislatures, in dealing with the saloon, except when controlled by a specific constitutional prohibition, must be held to be unlimited. This view of the matter makes of a state legislature a body with unlimited and unrestrained authority and power except in those specific instances in which there is an express, special limitation or prohibition imposed in some positive constitutional provision.

Taking this view of the matter, in Scmidt vs. the City of Indianapolis, 80 N. E. 632, the Supreme Court of Indiana said of the liquor traffic: "The evils which attend and inhere in the business of handling and selling intoxicating liquors are universally recognized, and the danger therefrom to the peace and good order of the community everywhere necessitates the exercise of the police power. This necessity for regulation and restriction in the interest of peace and good order and for the promotion of public morals, as already said, distinguishes the liquor business from useful and harmless occupations." And, in that connection the court said of the authority of the legislature: "It is well settled that the legislative power to deal with the subject, whether it be

to license, regulate, restrain or prohibit the sale of such liquors, is unlimited."

In other words, the court declares that the authority of the legislature to authorize, to license, that in which danger to the peace and good order of the community and the promotion of public morals inheres is unlimited, and also that the authority of the legislature to protect the community from such a danger by restraining or absolutely prohibiting the danger is equally unlimited.

So that the power of the legislature, in dealing with the saloon, whether it be to protect society from or to subject it to the evils thereof is without any limitation, in the opinion of this court. If the authority of the legislature, in dealing with the saloon, is without any limitation, merely because the constitution does not in so many words place a limitation upon its power in relation to the saloon or liquor traffic, then, the power of the legislature over every other matter, not thus mentioned, should be equally unlimited.

This method of constitutional construction would make it necessary for the constitution to contain a bill of particulars, mentioning in specific terms, each limitation of the power of the legislature. Either this, or we must admit that there is a special rule of construction for the saloon. This can not be true. Rules of construction must be general, and must apply alike to all things, coming within their limits. The doctrine that the power of the legislature to license the saloon is unlimited, merely because such authority is not denied in specific words in some constitutional provision, belongs to the rule of con-

struction, applied by an Indiana Justice of the Peace to the criminal code. One of his neighbors claimed that his crow-bar had been stolen by another neighbor, so he went to the office of a Justice of the Peace to file an affidavit charging the other neighbor with the theft. The old Justice took the statutes and looked them through and through, again and again, for the word crow-bar, but he was unable to find it. He could find the language, "Whoever shall feloniously steal, take and carry, lead or drive away the personal goods of another is guilty of larceny," but that did not say "crow-bar," and so he informed his neighbor that it was not unlawful to steal crow-bars.

Reasoning from the object of government, it absolutely can not be that a state legislature has the same power to subject the peace, the good order and the morals of a community to the dangers of the saloon, by licensing it, that it has to protect the community by preventing it. It is never legitimately within the power of any legislature to authorize, by a license, a danger to the peace, good order or morals of any community, even though there may be no express denial of such authority.

It is the sole purpose of government to protect rights, not wrongs. When the wrongs imposed upon the American colonists, in the name of government, became intolerable, the forefathers, in the declaration of their independence, indicated very clearly the purpose and the extent of the authority of government, when they announced:

"We hold these truths to be self-evident—that all men are created equal; that they are endowed by

their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

In this, the purpose of government is unmistakably defined to be the *security* of the "inalienable rights" of life, liberty and the pursuit of happiness, and the extent to which just power was to be conferred upon the government was also limited to the scope of the "consent of the governed." This consent was given for the security of these rights, not to authorize their infringement. The man who adverts to this declaration of fundamental rights, as a guide in the determination of constitutional questions, may be, by reason thereof, a crank, but, in so doing, he is merely following the precedent of courts of last resort.

In Gulf etc. Ry. Co. vs. Ellis, 165 U. S. 150, the Supreme Court of the United States said: "The first official action of this nation declared the foundation of government in these words: "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness." While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while, in all cases, reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read

the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

The spirit and thought of the constitution are found in the Declaration of Independence, according to this judicial declaration. The language just quoted has been cited and approved by the Supreme Court of Indiana. While it is true, beyond the adventure of a doubt, that the spirit and thought of the constitution of the United States and equally so of the constitution of each of the states, is proclaimed in a general way in the Declaration of Independence, yet it is also just as true that the governing spirit and thought of each of these constitutions is directly and specially announced therein.

In the preamble of the United States Constitution, the people declared their purpose, in the establishment of the government, as follows: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Likewise, in the preamble of the state constitution and in the first section of the Bill of Rights, the sovereign people of Indiana, proclaimed the end and purpose of the state government to be the establish-

ment of justice, the maintenance of public order, the perpetuation of liberty and the advancement of their peace, safety and well-being.

Desiring the perpetuation of a free government, and, expressing the belief that it can be preserved only by the general diffusion of knowledge and learning, in section one of article eight of the state constitution, the people expressly enjoined upon the general assembly the duty of encouraging, by all suitable means, their moral and intellectual improvement.

The just powers of the legislature, as one of the departments of government, are such only as the people, by their consent, have delegated to it, and, in a general way, the people have consented that it may have the just power to secure the inalienable rights of life, liberty and happiness, and then, to impress the full import of this grant upon the legislature, they say to the legislature you may or, perhaps, should legislate, in such a way as to accomplish the following results:

1. Establish justice.
2. Insure domestic tranquillity.
3. Provide for the common defense.
4. Promote the general welfare.
5. Secure and perpetuate the blessings of liberty.
6. Maintain public order.
7. The advancement of peace, safety and well-being.
8. To encourage moral and intellectual improvement.

In the first section of the Bill of Rights, the people announce the undisputed fact, that all governmental

power is inherent in themselves, so that their agent, the general assembly, can have only such power as they may consent to delegate to it. If the legislature were an agency of unlimited power, there would be no excuse for an enumeration of civic purposes. Is it a logical and reasonable method of determining the validity of legislative enactments to measure the results and effects of such enactments by the general purposes of government? This method is not an invention of the writer. It has often been employed by the courts, but they persistently refuse to do so when dealing with saloon statutes. If this be a legitimate method of constitutional interpretation, when dealing with things other than the saloon, it ought to be and is proper, when we seek to determine the constitutional status of the saloon. The Supreme Court of Indiana has committed itself to the proposition that an enactment of the general assembly contrary to and in violation of the spirit and purpose of the constitution is void.

In Columbia Athletic Club vs. State, 143 Ind. 110, the court said: "The constitution puts its special bans on lotteries, duels, and all infamous crimes; while at the same time it provides for the moral and intellectual improvement of the people. A statute which should attempt to authorize prize fighting would, most certainly, be opposed to the spirit of the constitution, and, indeed, to that of the law itself, long since defined to be 'A rule of civil conduct, prescribed by the supreme power of a state, commanding what is right and prohibiting what is wrong.'"

A prize fight is contrary to the constitutional purposes of moral improvement, public order, the

peace, safety and well-being of citizens, and consequently a statute, that would attempt to license it, would be clearly unconstitutional, but the saloon is many times more destructive of these ends of government than the prize fight. How can a business that is a contagious peril to the peace and good order of society, that is a prolific source of disease, want, pauperism, misery, vice, crime and public expense and that weakens, corrupts, debauches and slays human character and human life be otherwise than destructive of justice, domestic tranquillity, the general welfare, the safety, the peace, the well-being and the moral and intellectual improvement of the people?

In Ex parte Martin, 13 Arkansas 158, the Supreme Court of Arkansas said: "The constitution of the state contains no provision that private property shall not be taken for public use without just compensation; yet we hold that this prohibition upon the legislature is implied from the nature and structure of our government, even if it were not embraced by necessary implications, in other provisions of the Bill of Rights. The right of eminent domain is inherent in the government or sovereign power, and equally so is, or ought to be, in every government of laws, the vested right to his property in the citizen; and the right of eminent domain means that where the public necessity or common good requires it, the citizen may be forced to sell his property for its fair value. The duty of making compensation may be regarded as a law of natural justice, which has its sanction in every man's sense of right, and is recognized in the most arbitrary governments. To

suppose that the legislature under our constitution possessed the power of divesting the citizen of his right of property without first providing in some equitable mode for ascertaining its value, and making him compensation for it, and could exercise this power without restraint, would be subversive of the government, and equivalent to revolution and anarchy, since it would defeat one of the primary objects for which the government was established.

"The preamble to the constitution of this state declares the purpose of the people, in convention assembled, to be, in the ordaining of a constitution for their government, to secure to them and their posterity the enjoyment of all the rights of life, liberty and property, and the free pursuit of happiness. The first section of the Declaration of Rights is, that all men, where they form a social compact, are equal, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life, and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. And it is further declared that no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land. The last section declares that the enumeration of rights therein contained shall not be construed to deny or disparage others retained by the people.

"Now we feel it our duty to express the opinion we entertain, that the prohibition upon the power of the legislature to take private property for public use

without providing for just compensation to be first made to the owner is necessarily implied in the articles above quoted. The right of the citizen to acquire, possess and protect property thus guaranteed to all by the fundamental law, being a limitation imposed by the people upon the government of their own creation, and designed to protect the weak against the strong, the minority against the majority, would be of little avail and but an empty sound if the legislative department possesses the power to divest him of it without adequate compensation, through caprice or even in the exercise of honest but misguided judgment, or upon that most dangerous of all pretenses, for state reasons, and the policy of promoting what may be deemed the public good."

So that, this court held that the purpose of the people, in the institution of the state, was both a delegation and a prohibition of legislative authority.

In the Dorsey case, 7 Porter (Ala.) 293,350, the Supreme Court of Alabama declared that legislative acts, in order to be valid, must conform to the objects and purposes of the constitution, as expressed in the preamble, and said:

"Before proceeding to an examination of the constitution to determine if such qualification can be lawfully required, or such a disqualification created, and enforced in the manner contemplated by this act, it is not improper to declare that I consider the Declaration of Rights as the governing and controlling part of the constitution; and with reference to this, are all its general provisions to be expounded, and their operation extended or

restrained; the declaration itself is nothing more than an enumeration of certain rights, which are expressly retained and excepted out of the powers granted; but, as it was impossible, in the nature of things, to provide for every case of exception, a general declaration was added that the particular enumeration should not be construed to disparage or deny others retained by the people. What those other rights are which are thus reserved, may be readily ascertained by a recurrence to the preamble to the Declaration of Rights. The object to be attained by the people, when assembled in convention, was not the formation of a mere government, because such might, and in many cases would be, arbitrary and tyrannical, although democratic in its form; it was to form a government with clearly defined and limited powers, in order that the general great and essential principles of liberty and free government might be recognized and established. The general assembly is not expressly prohibited from enacting laws requiring political test oaths to be taken, nor from excluding some of its citizens from the pursuit of certain trades or avocations, yet no one would contend that any such laws could be operative because it is evident that they are adverse to the principles of liberty and free government."

Following along this line, the Supreme Court of the United States, in Calder vs. Bull, 3 Dallas 386, speaking by Judge Chase, said: "I can not subscribe to the omnipotence of a state legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the consti-

tution or fundamental law of the state. The purpose for which we enter into society will determine the nature and ends of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. There are acts which the federal or state legislature can not do without exceeding their authority. An act of the legislature (for I can not call it a law) contrary to the first great principles of the social compact, can not be considered a rightful exercise of legislative authority. The legislature may enjoin, permit, forbid and punish, and establish rules of conduct for all citizens in future cases; they may command what is right and prohibit what is wrong, but they can not change innocence into guilt."

Declaring that the purpose of government rises above, and sets bounds and restraints upon the power of the legislature, the Supreme Court of Maryland, in Regent vs. Williams, 9 Gill, 365, 408, said: "But the objection to the validity of the act of 1825 does not rest alone for support upon the construction of the constitution of the United States. Independent of that instrument, and of any express restriction in the constitution of the state, there is a fundamental principle of right and justice, inherent in the nature and spirit of right and justice, inherent in the nature and spirit of the social compact (in this country at least), the character and genius of our government, the causes from which they sprang, and the purposes for which they were established, that rises above and restrains and sets bounds to the power of legislation, which the legislature can not pass without exceeding its rightful

authority. It is that principle which protects the life, liberty and property of the citizens from violation in the unjust exercise of legislative power."

The whole matter would be simplified very much, if we would but bear in mind that the legislature is an agent of the people, constituted by them, to do for them and in their stead, certain things only. The most unlettered layman knows that, if he should appoint an agent to do certain acts for him, and the agent were to do something altogether different, he would not be bound by the acts of the agent. The purposes of government, as disclosed in the preamble and the Bill of Rights, are the doorway to legislative authority.

In Finner vs. Lugerme Co., 167 Pa. St. 632, the court defined the preamble of a statute to be: "The key of the statute to open the minds of the makers as to the mischiefs which are to be remedied, and the objects which are to be accomplished by the provisions of the statute."

The preamble to the constitution serves a similar purpose.

In an attempt to announce the limits of legislative authority in Griffith vs. Commissions, 20 Ohio 609, the Supreme Court of Ohio said: "It follows that a grant of legislative power in the Constitution of Ohio, must be in harmony with the great principles and objects of free government. The bill of rights thus becomes the basis on which the General Assembly is authorized to exercise legislative power, To determine the extent of the legislative authority under our Constitution, we are not confined to the letter of the Constitution, but we may properly look

to its declared principles and objects; and a statute violating these, is as clearly void as one violating the letter of the Constitution."

The general grant of power to a legislature is also the expression of a prohibition. There can be no legislature until it be constituted by the people. The mere constitution of a legislature gives it no power at all, and it can have such power and such only as may be delegated to it by the consent of the people. So, when the people, by their fundamental law, say the general assembly may do certain things, they thereby say, by implication, that it shall do nothing else.

Speaking upon this question, in Wilkinson vs. Leland, 2 Peters, 657, the United States Supreme Court, by Justice Story, said: "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention."

To the general assembly, the people, by their con-

sent, have yielded up all the legislative power that has been delegated to any governmental agency, but this falls short of affirming that the general assembly has absolute and unlimited authority.

Some courts, and, in fact, it may be said, most courts, if not all, when called upon to determine whether a legislative act violates the constitution, indulge the presumption of validity in favor of the act, and this casts upon those who attack the statute, the burden of establishing its invalidity.

In People vs. Draper, 15 N. Y. 543, upon this proposition, the Court of Appeals said:

"In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden. I do not mean that the power must be expressly prohibited, for there are but few positive restraints upon the legislative power contained in the instrument. The affirmative prescriptions, and the general arrangements of the constitution, are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision. The form of the government; the grant of legislative power itself; the organization of the executive authority; the erection of the principal courts of justice, create implied limitations upon the law making authority as strong as though a negative was expressed in each instance."

Again affirming this proposition, in People vs. Albertson, 55 N. Y. 50, the court said:

"A written constitution must be interpreted and effect given to it as the paramount law of the land, equally obligatory upon the legislature as upon other departments of government and individual citizens, according to its spirit and the intent of its framers, as indicated by its terms. An act violating the true intent and meaning of the instrument, although not within the letter, is as much within the strict letter; and an act in evasion of the terms of the constitution, and frustrating its general and clearly expressed or necessarily implied purpose, is as clearly void as if in express terms forbidden. A thing within the intent of a constitution or statutory enactment is, for all purposes, to be regarded as within the words and terms of the law. A written constitution would be of little avail as a practical and useful restraint upon the different departments of government, if a literal reading only was to be given it, to the exclusion of all necessary implications, and the clear intent ignored, and slight evasions or acts, palpably in evasion of its spirit, should be sustained as not repugnant to it. The restraints of the constitution upon the several departments, among which the various powers of government are distributed, can not be lessened or diminished by inference and implication; and usurpations of power, or the exercise of power in disregard of the express provisions or plain intent of the instrument, as necessarily implied from all of its terms, can not be sustained under the pretense of a liberal or enlightened interpretation, or in deference to the judgment of the legislature, or

some supposed necessity, the result of a changed condition of affairs."

The people became so zealous in their determination to limit the authority of legislatures to the securing of fundamental rights, that, in the 14th amendment of the United States Constitution, they placed, in general terms, an express limitation upon the prerogatives of state legislatures, in the following negatives:

"No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

By the constitutional preambles and the bills of rights, the people have said to the state legislatures, "You may and should make and enforce laws to protect and make safe our privileges as citizens," and, in the fourteenth amendment, they have said: "You shall not make nor enforce any law that will abridge our privileges or deny to us equal protection." The limitations of the fourteenth amendment are general. No specific mention is made of any thing as an abridgment of the privileges of citizens. If a specific denial of authority to enact a particular statute be required, in order that there may be a constitutional prohibition, then the fourteenth amendment is absolutely nugatory, but it is not, and is never so evaded, except when courts are called upon to enforce it against legislative acts, legalizing the saloon. Then,

the courts evade it by declaring that it is the exclusive province of state legislatures to determine what is an abridgment of the privileges of citizens and to determine whether its acts deny to the people the equal protection of the laws. This method of evasion is not, however, employed generally, but only to avoid the inevitable conclusion that must follow from the application of universally acknowledged legal principles to the saloon, as the courts themselves have estimated the institution.

The limitations of the fourteenth amendment, being general, it must surely follow that the authority is confided to the courts to determine whether a particular enactment has the effect to abridge the privileges of citizens or to deny the equal protection of the laws. Upon this point, the Supreme Court of the United States has said: "Whether or not a state law will have the effect to authorize an abridgment of the privileges of citizens or will deny to persons the equal protection of the laws is not a question, subject to legislative determination, but is necessarily and essentially a judicial question, so that the courts alone are the arbiters of constitutional questions."

Upon the same question, in McKinster vs. Sager, 163 Ind. 671, the Supreme Court of Indiana said:

"If there is one occasion more than another which calls upon a court to vindicate the fundamental law, it is upon the complaint of a suitor who shows that there has been an attempt by hostile and discriminative legislation to bar his right to the ultimate process of the court, for such enactments strike at the very root of justice.

"There is, and always will be, in every representative government, a struggle going on between the various interests of society with reference to legislation. This but evinces the necessity for the existence of a co-ordinate department of government, also acting under the responsibility of an oath, to determine, when called on to enforce legislation, whether it operates unequally."

And, in determining, what is meant by "privileges of citizens," the United States Supreme Court says: "They are the rights, which are fundamental, and belong, of right, to the citizens of all free governments; they are those inherent and inalienable rights, not granted or conferred by governmental decrees, but by the endowment of God; they are those rights, which, to secure and make safe, not to grant, free governments were established among men; they are those rights so graphically proclaimed in the Declaration of Independence and as clearly recognized in the preamble to the United States Constitution."

And it would clearly do no violence to add to this, "and those rights enumerated in the preamble and bills of rights of state constitutions."

These rights, so announced and specified, are life, liberty, happiness, justice, domestic tranquility, the common defense, the general welfare, the blessings of liberty, public order, moral and intellectual improvement, the peace and safety of citizens.

So that, if the saloon be a violation of these fundamental rights, it can not be regarded as lawful merely on the basis of toleration. And, if, in

its natural state, it be an invasion of these rights, it can not be made lawful, by express permission, without abridging the privileges of citizens or denying the equal protection of the laws, for, in the language of the Supreme Court of Iowa: "No legislature has arbitrary and capricious powers, and no legislature can rightfully exercise the power that the people have assigned it, except for the purpose of their safety, which involves the suppression, not the protection, of evils threatening the subversion of the peace, comforts, and good morals of the people, and their quiet and full enjoyment of property."

The innate character of the saloon and its effects upon society must determine whether it is lawful on the basis of toleration, and, if not, whether it can be made lawful by express permission.

The writer need not express any personal opinion of the saloon. We may accept the estimate, placed upon it by Supreme Courts, which are abundantly sufficient for the purposes of this discussion.

In Pearson vs. International Distillery, 72 Iowa 348, the court said:

"The evils flowing from intoxicating liquors arise wholly from its use as a beverage. But this use is wide spread, reaching all classes of the people, and both sexes, and every age. No condition of life is wholly exempt therefrom. An enumeration of all the evils arising from the use of intoxicating liquors need not be attempted. They are numerous and affect the people collectively and individually.

Idleness, poverty, pauperism, crime, insanity, disease, and the destruction of human life, follow indulgence in the habit of using intoxicating drinks. Millions of our fellow-countrymen are addicted to this habit, and of these, millions become drunkards. Homes are broken up, and domestic peace is destroyed by drunkenness. The prisons, almshouses, and institutions for the care of orphanage, insanity, and affliction, are largely filled by the vice. These are evils, but not all of the evils, of the alcohol habit, affecting the social condition of the people, and their comfort and good morals. But other evils attending the use of intoxicating beverages affect the state and its government. It is the prolific source of crime, pauperism, and insanity, and thereby entails taxation to defray the expenses of the conviction and punishment of criminals, and the support of almshouses, asylums, and hospitals. It deteriorates mentally and physically the human stock, rendering its victims, as well as their progeny, less capable of bearing arms in defense of their country, and of discharging other duties of the citizens. Soldiers are unfitted for duty by it, and thereby battles have been lost, and the liberty of nations, if not lost, has been imperiled. Tradition perpetuates, if history does not fully record, the evils which have flowed from the alcohol habit of officers and soldiers in our armies. Washington struggled with difficulties occasioned by it, and other commanders of later days have had a like experience, while patriotic soldiers have suffered on account of inebriety of officers in all branches of the military service. The appetite for strong drink,

possessed by so many of our countrymen, demands constant gratification, and the expenditure therefor of enormous sums of money, thus creating a business—the keeping of saloons and dram-shops, in which are employed an immense number of men. Their business, and their relations with the idle and dangerous classes of society, give them great influence in public affairs. The municipal governments of the cities, often burdened with debts, and robbed by unfaithful and mercenary officers, in all departments, give evidence of the direction in which this influence is exerted. Thinking men of this day largely concur in the opinion that the influence of the saloon, and the idleness and vice of the multitude of its clientage, united, constitute the great peril of American institutions. We think none will deny that nothing but evil flows from this source.

"The power to prohibit the sale of intoxicating liquors has been exercised by many states, and traffic therein with Indians has been prohibited by statutes of the United States, and of this and other states. The preservation of order in the Indian tribes, and peace between them and the frontier settlers, the prevention of famine and disease, and the preservation of the very existence of these savages, are the humane objects of these statutes.

"The same purpose demands legislation to protect the inebriates among our own countrymen, probably equalling in number all the Indian tribes, from the destructive consequences of the gratification of their appetites for strong drink, which is no less uncontrollable in them than in the Indians. Surely, humanity and patriotism demand that the same pro-

tection be extended to this unfortunate class of citizens of the United States which is secured to the savage wards of our government."

The court here charges that the results of the saloon affect all persons, without regard to race, age or sex and its results are declared to be nothing but evil. The ravages upon society, charged to the saloon, by this court, include, idleness, poverty, pauperism, crime, insanity, disease, death, broken homes, domestic unhappiness, vice, prisons, almshouses, orphanages, mental and physical deterioration of the human race, public expense without any adequate return, and the corruption of public officers, and then, the court sums it all up by saying that it is "the great peril of American institutions." Then, if the saloon be lawful at common law, we may and do have a lawful peril to American institutions. On this basis the *great* peril to American institutions is lawful.

Courts have said, time and time again, that whatever invades the fundamental rights of citizens is unlawful, in the absence of any statute, and also that legislatures can not make lawful, by statute, anything, which, because of its inherent evils, invades the fundamental rights of citizens.

If the saloon, in view of the estimate placed upon it by the Supreme Court of Iowa, does not inherently invade the fundamental rights of a citizen, then, nothing ever did or ever can. A midnight raid of whitecappers and incendiaries would be lawful on this basis, in the absence of a statute against it.

Prof. George R. Stewart, president of the State

University of Tennessee, says of the saloon: "The liquor traffic, which consumes $14,000,000 every year, is a monstrous snake, crawling through our beautiful country, devouring here a man, here a village, here a mayor, here a town council, here a board of county officials, here a state legislature.

"You will find that 70 per cent. of the divorce business is directly traceable to the saloon. Poverty, the struggle for bread, is directly traceable to the liquor traffic. Back of the shattered home, the ruined life, you will find liquor, liquor, liquor!

"Fifty years from now we will tell it to our children as a joke that the government of the United States once actually licensed men to sell liquor and debauch other men. * * * The highway robber takes a man's money and leaves him nothing. And the highway robber is better than the saloon keeper or any man who will vote for the saloon keeper. The highway robber takes his dollar and leaves his body unhurt. The saloon keeper takes his dollar. He hurts his body, his mind, his nerves, his reputation, his character—ruins him for making another dollar. The saloon keeper puts his hand into the man's bosom and pulls out his immortal soul and throws it into hell."

If this estimate be correct and the saloon is lawful, in the absence of specific legislative condemnation, then it is lawful to devour men individually and collectively, lawful to corrupt mayors, city councils, county officers and legislatures, lawful to take from men their nerves, their mind, their characters and their lives. No one would assent to this proposition directly, but it is indirectly affirmed,

whenever the saloon is declared to be lawful at common law.

The reasonable conclusion is that the saloon is unlawful in the absence of any legislative action, and it is so very unlawful that no legislative enactment can make it lawful without invading the fundamental rights of citizens.

CHAPTER XVII

PROHIBITION BY LEGISLATIVE ENACTMENT THE ONLY LOGICAL SOLUTION OF THE SALOON PROBLEM

Even from a purely legal standpoint, legislative prohibition is the only logical solution of the saloon problem. A strenuous and persistent effort has been made by liquor journals and saloon advocates, for a year or more, to create the impression that the position of the writer, that the saloon is inherently and consitutionally unlawful and a nuisance, would completely withdraw and entirely remove the subject from the realm of legislative action. Nothing could be farther from the truth. Murder is unlawful in the absence of any legislation whatever, but the fact that it is, does not, in any sense, nor to any extent, remove it from the province of legislative consideration.

Its inherently unlawful status is a most persuasive reason for the infliction of just penalties, and this can be done only by and through legislative provisions. For years the Supreme Court of Indiana consistently held "bucket shop" gambling to be unlawful at common law, but those engaged in the business could not be punished for the offense, because the legislature had provided no penalty.

So, the fact, that the saloon is within itself unlawful, is an invitation, a call to the legislature to act, and prescribe the penalty for its operation, and that is all that is meant by prohibition.

Murder, stealing and burglary are prohibited,

that is, persons committing the acts are liable, under the criminal law, to punishment therefor.

To prohibit the beverage liquor traffic means merely to make it a criminal offense to engage therein.

Every state has some degree of saloon prohibition now. In seven of them, it is a crime to sell for beverage uses at any time. This is absolute statutory prohibition. In all of the other states, it is a criminal offense to sell on certain days and during certain hours, and this is partial or limited prohibition. But, if the saloon be a nuisance within itself, why prohibit it by direct and specific enactment? For the very purpose of determining once and forever the question.

Many things are specifically outlawed that might be outlawed under a general statute, and this is in keeping with the spirit of the criminal law. The courts declare that brothels and gambling dens are within themselves unlawful and public nuisances, and yet the legislature has not provided for the punishment of offenders in these evils under the nuisance statute, but by special, specific provisions.

There is no good reason for giving the saloon legal recognition and countenance, any more, nay, not so much, as there is for the legal approval of the lottery, the brothel and the gambling den, and there is not a shadow of an excuse for the legal sanction of any one of them. They all infringe upon the rights of citizens, and, as it is the duty of legislatures to provide for the security of the rights of the people, it is incumbent upon such bodies to prohibit all of them, and especially the saloon,

which is the prolific mother of all the others. Many objections are urged to the prohibition of the saloon, but no public objection is heard against the prohibition of the other evils named. The reason is very apparent. The saloon has been given the sanction, encouragement and protection of legislative enactments, and has thereby been given a semblance of decency and respectability, which for many years has protected it from the assaults of the moral and righteous forces of society. It has made the most, or, perhaps, the worst of this entrenchment, for, upon the single platform of greed, its rapacity has run rampant, until the moral forces of society are now in open revolt against it everywhere. It can scarcely find a defender anywhere. In fact, it does not even defend itself. It is confessing, but it is not confessing that it has been obeying the law and respecting the rights of society. It admits that it has been bad, and it is promising to be good. Its hope is to gain another lease of life by this subterfuge.

The saloon has become so odious and the revolt so ominous that Bonfort's Wine and Spirits Circular, a liquor journal, confesses as follows: "The average saloon is out of line with public sentiment. The average saloon ought not to be defended by our trade, but it ought to be condemned. In small towns the average saloon is a nuisance. It is a resort for all tough characters, and in the South for idle negroes. It is generally on a prominent street, and it is usually run by a sport, who cares only for the almighty dollar. From this resort the drunken man starts reeling to his home; at this

resort the local fights are indulged in. It is a stench in the nostrils of society, and a disgrace to the wine and spirit trade. How, then, shall we defend the average saloon? We answer, don't defend it; condemn it."

This confession is a fair definition of the saloon. It is a moral leper and social reprobate in any community. It is gross, obscene, vulgar and profane. It is the home of gamblers and other criminals and the resort of prostitutes. Its decorations are immodest, indecent and suggestive. With these facts before us, there is no middle ground; no room for sentimentalism; no basis for a compromise. It is a place of unadulterated evil; it can not be made respectable; it must go. The so-called ideal saloon does not exist; it is merely an imagination. The decent, respectable saloon is as impossible as a virgin prostitute.

Speaking of the saloon along this line, the Rev. Dr. Charles H. Parkhurst, of New York, said: "I know what these saloons are. I have visited them at all hours of the night, and on all nights of the week, and there is not an extenuating word that deserves to be spoken in behalf of them. They are foul, beastly and swinish, the prolific hot-beds of vile politics, profane ribaldry and unspeakable sensuality. * * * I am talking now of the saloon as we know it here in New York, licensed swilling places, a combination of Tammany caucus, whisky sewer and bawdy house. There is no use in trying to improve them or to convert them; there is no convertible quality attaching to

them; there is no decent ingredient in them that amelioration can fasten to them.

"It was cruel for General Sheridan to say: 'The only good Indian is a dead Indian.' It is not cruel to say, 'The only good saloon is a dead saloon.'"

There can be only one effective method of solution and that is the annihilation of the saloon.

"THE SALOON MUST GO" MUST BE A PARTY POLICY.

Since we enforce and administer governmental policies through the agency of political parties, it, at once, becomes manifest that prohibition can be made most effective only when it is the policy of the ruling party. Local prohibition is often satisfactorily administered, but only so, when the officers charged with its execution are in sympathy with the principle.

The anti-saloon or prohibition democrats and republicans must either make prohibition a part of their party creeds, or they should become party prohibitionists, or all anti-saloon people unite in some new party committed to the annihilation of the saloon.

The Free Soil and Abolition parties kept the embers of anti-slavery alive for decades, but, when the people became aroused to unity of action, they chose a new party name, and so it may be with the saloon evil.

For practically a third of a century, the Prohibition party has consistently and doggedly pursued the saloon with a relentless determination to drive it out of a sanctioned existence.

The apparent results, for a long while, were not very encouraging, and from the standpoint of drawing public salaries, they are not now and may never be, but, from the viewpoint of antagonism to the saloon, the results are highly satisfactory to the sincere, honest prohibitionist. To the man, whose purpose is the good of society in the overthrow of the saloon, instead of party leadership and public office, it makes no difference under what party label the desired result may be accomplished.

PROHIBITIONISTS SOMETIMES HINDER SUCCESS.

No reasonable man would intimate that a conscientious conviction of principle should be surrendered as a mere matter of expediency, but, while this is true, a sincere, conscientious anti-saloon man should not refuse to array himself against the saloon in local option elections and remonstrance contests solely because absolute prohibition can not be accomplished thereby. Prohibitionists sometimes assume this attitude, and thereby injure the cause of saloon elimination.

However, it must be conceded that both local option and remonstrance statutes are compromises with the saloon evil, and they are compromises of a character that the people would not tolerate, for an instant, relative to gambling or the social evil. But, while such statutes are compromises, where public sentiment is favorable, they can be so enforced as to give an object lesson of the blessings of prohibition. Local prohibition, well enforced, is the strongest possible argument in favor of absolute prohibition.

CHAPTER XVIII

OBJECTIONS TO SALOON PROHIBITION

A very great many objections have been urged against the absolute prohibition of the saloon, some of them so flimsy and frivolous that they merely serve as an excuse for the person advancing them, and, yet, there are, at least, two excuses that are pretty generally adopted by saloon advocates, or rather by the opponents of saloon prohibition.

Do Saloons Help Legitimate Business?

There is a large element of people, whose pocketbooks are more sensitive than their consciences, who have been inveigled into the belief that saloons are necessary to business prosperity, and it is but fair to say that this notion is not confined exclusively to the saloon element.

There are men, who do not drink and who do not even visit saloons, who lend the saloon their moral support, or, perhaps, it would be more nearly correct, to say that they withhold from the anti-saloon forces their support and influence upon the ground that the elimination of the saloon will be injurious to the business interests of their communities. To these people money is their god, and its acquisition is their sole ambition in life. If the contention were conceded to be well founded, it would not be a sufficient argument, because health, happiness, character and domestic peace can not be consistently bartered away for business success. But, even from a purely financial point of view, the argument is unsound and wholly without any foun-

dation in fact. The presence of saloons does not advance legitimate business, but endangers it, and the absence of saloons, instead of injuring business, accelerates it.

DENS OF VICE ARE NOT ESSENTIAL TO BUSINESS PROSPERITY

Nothing can be more fallacious than the theory that dens of vice and crime are essential to business thrift and progress. Dens of vice and crime mean the waste of time, the waste of energy, the waste of industry, the waste of earnings, the waste of mental capacity, the waste of moral character and the waste of health, and how can such drains upon natural conditions be conducive to the industrial welfare of the people? Concrete examples of the effects of banishing saloons from communities ought to be the best arguments either for or against the saloon as an industrial benefit.

OBSERVATIONS OF A GROCER

A few weeks ago, the writer met a grocery man living in an Indiana town of about four thousand population, from which the saloons had been driven, by a remonstrance, seven months previously, and thereafter the law had been strictly enforced. A large per cent. of the population was made up of laborers in the factories. The grocer described the situation by saying: "When the remonstrance contest was on, I took no active part against the saloon. In fact, I did not sign the remonstrance. I was fearful that, if we put out the saloons, we should injure business. I was in debt, and I felt

that I ought not to jeopardize my business. The remonstrance was successful. The saloons were closed. During the last seven months the law has been strictly enforced in the town against liquor selling, and I am glad to say that I was mistaken in the effect the closing of the saloons would have upon my business. In seven months, my grocery trade has increased more than 50 per cent. I have had no increase in the number of customers. My increase of sales is merely an increase in the amount of purchases by my former customers. I am now getting the money that the saloon keepers formerly received, and the families of these customers are now well fed, instead of going hungry, as they frequently did when we had saloons. I have learned that my real competitors in the grocery business were the saloon keepers, and not the rival grocers."

OTHER OBJECT LESSONS

In September, 1907, there was a remonstrance contest to close the saloons in the city of Lebanon, Indiana. One day, when the battle was at fever heat, a farmer came walking into the office of the writer, and expressed himself thus: "They say it will ruin business, if we close the saloons. You know that I drink, and I am often fined for intoxication. If the saloons were closed, I would not drink and I would have no fines to pay. If I could save for my family the money that I now spend for liquor and the payment of fines, I would like to know how that would hurt my business."

With the saloons, this man and his family received disgrace, misery and unhappiness for his

money, and, without the saloons, they receive the necessities and comforts of life. How could the saloon, under such conditions, benefit the business of this family? And this is not an unfair example. It is an actual reality.

Cambridge, Massachusetts, had licensed saloons for the ten years, from 1875 to 1885, and has had no licensed saloons since 1885. In the ten license years there was a decrease of three million dollars in the valuation of the property of Cambridge, while, since 1885, there has been an increase of forty-six millions or more than two millions annually.

The licensed saloon necessitates a police force and makes criminals, paupers and lunatics, and the expenses occasioned thereby must be met by taxation upon the general public.

A special investigation in Massachusetts, made under authority of the legislature, by Commissioner Wadlin, of the Labor Bureau, shows that, of the adult insane, 51 per cent. were victims of the liquor habit; of adult paupers, 71 per cent. were saloon victims, and of the adult criminals, 96 per cent. were victims of the saloon. What do the people of Massachusetts, who pay the taxes to support these lunatics, paupers, and criminals, receive in return as a business investment? Nothing but a debased and debauched citizenship.

Bishop Spaulding, in an essay on "Labor and Capital" says: "The foe of labor is not capital, but ignorance and vice. In the whole English speaking world, its worst enemy is drink. More than a combination of all employers, the saloon has the power

to impoverish and degrade the workingman." If this be a correct statement of facts, is the saloon good for the business of the laboring man?

Of its effects upon the laboring man the Boston Post said: "The great curse of the laboring man is intemperance. It has brought more desolation to the wage-earner than strikes, or war, or sickness, or death. It is a more unrelenting tyrant than the grasping monopolist. It has caused little children to be hungry and cold, to grow up among evil associations, to be reared without the knowledge of God. It has broken up more homes and wrecked more lives than any other cause on the face of the earth." The authority of this statement has been attributed to Cardinal Gibbons.

In a speech delivered in Indianapolis on December 3, 1907, Assistant Attorney General Trickett, of Kansas, discussing the business aspects of the prohibition of the saloon, said: "Let us take your neighbor state of Illinois, a state with a rich soil, a state with abundant rain, a state with all the natural advantages to make it one of great wealth. Go out along the prairies and take the state of Kansas, a state one-half of whose territory, was formerly known as the Great American Desert, a state that is the home of the cyclone, the grasshopper, the drought and the green bug, and yet with only one-half the age of Illinois the people have three times as much money on deposit per capita as the people of Illinois.

Go away up to the northeast corner of our Nation, and you will find the Pine Tree State, with one-

half of her territory unfit for cultivation, is more prosperous than Illinois. In 1855 when Maine adopted prohibition it was the poorest state in the Union, the most drunken state in the Union, and yet after fifty years of prohibition the people there have on deposit in the banks $104 per capita while Illinois has $20.74 per capita. I told you that fifty years ago Maine was the poorest and most drunken state in the Union; yet in that time Maine has organized more banks and has in them $22,000,000 more than has the wide-open state of Ohio with six times her population. Why is it that business men will not realize that booze and bankruptcy go hand in hand?

In this Union of ours, out of every one thousand boys from ten to fourteen years of age seventy-one are illiterate. Out in Kansas there are only nineteen out of each thousand who are illiterate; up in Maine there are forty-nine. Why is it? Because Kansas spends twice as much in proportion for education as Illinois and Maine spends twice as much for education as does Illinois. It is well, and poor old prohibition Kansas and poor old prohibition Maine believe it is well, to put books instead of bottles into the pockets of the young people."

And it may be added that Maine is the only state in the Union that has more bank depositors than voters.

The eradication of the saloon is inevitably a business advantage. It can not be otherwise, for the saloon is worse than larceny and burglary. If a thief or a burglar take a man's money, he does not necessarily injure the man, but, when the saloon

keeper takes a man's money and gives him liquor, he injures the man both morally and physically.

In 1903, there were, according to official authority, twenty-three prohibition counties in Texas without a single convict in the penitentiary, and nine counties with only one convict each. In thirty-nine prohibition counties there were only twenty-three convicts in all. A majority of the jails in Kansas are without a single inmate.

Rochester, New York, is a city of two hundred thousand population and has six hundred saloons. In 1907, there were four times as many murders in Rochester as there were in the entire state of Maine.

PROHIBITION CONDUCIVE TO HOME-OWNING

In the number of homes owned by the people who live in them, prohibition Maine leads the world. Seventeen out of every 100 families are home owners in New York, with her 27,000 saloons, eighteen in Massachusetts, nineteen in Connecticut, and forty-nine clear home-owners out of every 100 families in Maine.

Fifty-five per cent. of the population of Massachusetts is under high license, and that 55 per cent. furnishes 63 per cent. of the insanity, 70 per cent. of the pauperism and eighty per cent. of the crime of the state.

In weighing the financial features of the saloon question, we should bear in mind that these saloon-made lunatics, paupers and criminals are not only removed from the productive branch of citizenship,

but that the sober citizenship is taxed to maintain them.

According to the figures disclosed by an investigation of official records the direct and immediate cost of the saloon from the public revenues is five times as much as all license fees received from the traffic. Then, how can saloon prohibition be bad for anybody's business, but that of the saloon keeper?

DOES PROHIBITION PROHIBIT?

That "prohibition will not prohibit" is the most common and also the most effective argument of saloon keepers. The mere statement of the proposition is an impeachment of the saloon, not of the prohibitory statute. If prohibition will not prohibit, it is because, in the first place, saloon keepers are not law abiding citizens, but are naturally law defiers and law violators. It means that saloon keepers do not respect the law, but always resist it. Nullification of the law is the creed of the average saloon keeper.

The natural and inherent tendency of the business is to engender and foster a spirit of anarchy. As a rule, the average saloon keeper has no more respect for the law and the right of society than the safe-blower, the burglar or highwayman. The object of the safe-blower, the burglar and highwayman is to procure another's property without injuring him personally, but it is the mission of the saloon keeper not only to procure the property of his neighbor, but to injure him mentally, physically, morally and socially.

That this estimate of the average saloon keeper is correct there is no doubt, and it is certainly not unfair to them to quote their own declaration, as admissions.

ADMISSIONS OF SALOON KEEPERS

The liquor journal, The National Advocate, says: "In our meetings the saloon men merely demand the right to defy any man who shall impose upon them any law that is against them. Such laws ought to be defied; they should be trampled in the dust; and if they can not be revised, then we say it is time to become anarchists."

The same journal, in a later issue, said: "We agree with the narrow-minded people of the state of Ohio that the Sunday ordinance is a law, but, like the slave law, it should never have been made, for this glorious country is supposed to be one of freedom."

The Wine and Spirit News approved this statement and added: "And then because one element of the voting population is able by a dozen votes, or even less, to say that the opposing element must not purchase or consume stimulants, is a piece of legislation contrary to the very spirit of legislation. It is a matter that law-makers should have nothing to do with."

The history of the Hay-market Riot in Chicago, and of the mobs in Evansville, Cincinnati, Pittsburg, Muncie, and other places, proves the saloon to be the exciting cause, in most instances, of mobs and riots. Authorities have learned that the most effective means of quieting mobs is to close the

saloons, and so, when a strike, a, riot or a mob occurs in a city, the first step of the official authorities is generally to order the saloons closed. Such official orders are, within themselves, the most severe arraignment that can be made of the saloon.

PROHIBITION NOT SELF-EXECUTING

And now to the proposition that prohibition will not prohibit.

No statute upon any subject will execute itself. A spade will not dig, but, when directed by intelligence and force, it is a most convenient implement with which to dig. A prohibitory statute is not any more than any other statute, self-executing. In the hands of honest, faithful and intelligent officers, the saloon prohibitory statute will as nearly prohibit as any other statute. There are places where the officers make no pretense at enforcing the law against the saloons, and saloons run wide-open all the time. The fault, in such cases, is not with the law, but with the officers.

In Maine, the Sheriff is charged with the execution of the prohibitory law, but there are Sheriffs in Maine, who disregard their oaths of office and their public obligations and protect the saloons. Instead of executing the law against the saloon, they allow the saloon to execute them against the law. Some people mistake the treachery of the officers for an imperfection in prohibition, and denounce prohibition as a failure, when they should denounce their officers as public frauds.

In the recent local option campaign in Delaware, the Sheriff of Cumberland County, Maine, was one

of the speakers in behalf of the saloons. He went to Delaware to confess that prohibition in the county in which he had sworn to enforce it, is a failure. He was not, however, confessing the weakness of the law, but his own official perfidy. There is no failure of the law in his county, but there is a flagrant failure in its execution.

For several years the saloons have run wide-open in Indianapolis on Sundays. The anti-saloon sentiment became so strong and threatening that, according to the Indianapolis News, the brewers, in September, 1907, in an attempt to appease the epidemic of indignant public sentiment against the saloon, ordered the Mayor to close the saloons on Sundays, and the saloons were closed.

Commenting upon the situation, editorially, the News said: "It has been demonstrated to an absolute certainty that the Sunday prohibition law can be effectually enforced, if the officers charged with its execution have more respect for their oaths of office and their obligations to the public than they have for the promises made to the brewers and saloon-keepers before the election." This tells the whole story. Whether or not prohibition is a failure in any community depends upon whether the law is honestly administered and enforced by honest officers.

OBJECT LESSONS

The saloons, five in number, were remonstrated out of a certain township in one of the counties in Indiana, and the five saloon-keepers and two other men, imported from Indianapolis, concluded that

"prohibition is a failure," and they opened "hop ale" and "jocco joints," which were, in reality, clandestine saloons. In a few days, the seven men were arraigned before the judge of the county and pleaded guilty. The judge assessed the limit of punishment, a fine of one hundred dollars and six months in jail, and then said: "You must pay these fines and costs now, and I will tell you how you gentlemen may avoid going to jail. If you gentlemen from Indianapolis will take the first car out of the county and remain out, you can escape the jail sentence. And on condition that the clandestine sale of liquor in this township must stop absolutely, you five gentlemen may remain out of jail, but, if the sale is resumed, you will each receive the last minute of the six months."

The sale has never been resumed in this township, and so we have a concrete example of *prohibition that does prohibit.*

KANSAS CITY, KANSAS

For years the prohibition statute in portions of Kansas was a dead letter, because of the alliance of the officers with the saloon interests, and this was especially true of Kansas City, where on the 8th day of June, 1906, there were two hundred fifty-six saloons, two hundred gambling rooms and sixty bawdy houses. With dishonest and corrupt officers, the statutes against gambling and the social evil will no more prohibit than will an unenforced statute against the saloon, but yet no one has the temerity to denounce the statutes oulawing gambling and

prostitution on the ground that they don't "prohibit!"

Assistant Attorney General Trickett took upon himself the task of enforcing the law in Kansas City, Kansas, and, in less than sixty days, had closed and driven out of the city every saloon, every gambling house and every den of the social evil. Not only that, but the mayor of the city, who blatantly and impudently said: "God can not and man will not close the saloons of Kansas City, Kansas," was ousted from office and fined one thousand dollars. During the last year the saloons were allowed to run wide-open in Kansas City, Kansas, there were twenty-five men sent to the reformatory, from Wyandotte County, in which Kansas City is located, and in the sixteen months since the saloons have been closed there have been but two men sent to the reformatory from this county.

SAN FRANCISCO

At the time of the earthquake disaster at San Francisco, on April 18, 1906, there were 3,400 saloons in the city, and prior to that date there were, on an average, one hundred and twenty-five criminals arraigned in the police court daily. From the disaster until July 5th, there was strict prohibition in the city, enforced by military power, and during this period the average daily arraignments in the police court numbered about four. Within three days after the re-opening of the saloons the daily arraignments in the police court had again run up to one hundred and thirty-four.

ST. LOUIS

After the Sunday saloons in St. Louis had been closed for nine months, by order of Governor Folk, the Kansas City Star, discussing conditions both before and during the reign of Sunday prohibition in St. Louis, said: "Sunday drunkenness in public places was common. The revelry commenced Saturday night and lasted until the cold, gray dawn of Monday, and when the cold, gray dawn of Monday arrived there were usually from one to three dead men in the city morgue—shot, stabbed and beaten to death in drunken Sunday brawls. In each of the several police courts from twenty-five to one hundred and fifty cases were docketed on Mondays, and the city jail, with a capacity of two hundred and fifty prisoners, was usually full.

"In the first place, they have quit killing people on Sunday to make a St. Louis holiday. The coroner has far less work to do, and the morgue keeper has a chance to read the newspapers. There are now fewer than one hundred prisoners in the city jail—a state of affairs not paralleled in years—and a recent report of the police department records shows that crime has fallen off something like seventy-five per cent. in twelve months."

RICHMOND, KENTUCKY

In July, 1907, Richmond, Kentucky, closed her saloons by local option prohibition. In its issue of December 31, 1907, the Interior Journal, of Stanford said: "The reports from the police department of Richmond since the city closed twelve saloons last July showed 300 per cent. decrease in crime, a

like reduction in the cost of the jail, and 600 per cent. less arrests for drunkenness, 342 for the last half of last year as against sixty-five for the last half of this year under local option."

BOSTON AND PORTLAND

Massachusetts is a license state and Boston is a high license city. For each ten thousand of her population, Boston has each year an average of four hundred and twenty-six arrests for drunkenness, while Portland, Maine, has only eighty-four. It costs Boston three dollars per capita to police the city and Portland only one dollar and five cents. It costs Boston twenty-nine cents per capita for jails and Portland two cents. For each ten thousand of her population Massachusetts has thirty-three criminals in the penitentiary and Maine has only thirteen.

WEST VIRGINIA

Using the last Federal census and the reports of the West Virginia State Auditor and the Warden of the penitentiary, Theodore Alvord, State Superintendent of the West Virginia Anti-saloon League, makes the following comparisons of the license and no-license counties in West Virginia:

"There are fifty-five counties in West Virginia.

Thirty-two counties grant no liquor licenses.

Twelve counties grant licenses in one town each.

Eleven grant licenses wherever an application is made.

There were 748 prisoners in the penitentiary the first day of October, 1904.

Of this number, 106 came from the 32 no-license

counties; 184 came from the 12 one-town license counties; 458 came from the 11 license counties.

One hundred and fifty-nine came from Fayette county, which has 3 per cent. of the population of the State, and 20 per cent. of the inmates of the pen.

Fayette county has 53 men in the penitentiary more than have the 32 no-license counties.

The license counties have one man in the pen for every 599 of their population; the 12 one-town license counties have one for every 1371; while the 32 no-license counties have one for every 4022.

Several no-license counties have no one in the pen, several have one each, and the highest number from any no-license county is 9.

Hancock county, which has not had a saloon for 60 years, had not one cent of criminal expenses for the year ending October 1, 1904.

The criminal expenses of the no-license counties averaged 72 mills for each inhabitant; the one-town license counties averaged 93 mills, and the license counties averaged 267 mills.

Fayette county and McDowell is each a paradise for the saloon—that is, each has saloons everywhere any one thinks he can make the business pay, and the saloons are run without any reference to the law. The first has one person in the pen for every 202 of population, and McDowell has one for every 190; the criminal expenses in Fayette are 491 mills for each inhabitant, and in McDowell 919 mills for each inhabitant."

The contention is often made that, in the absence of the licensed saloon, the speak-easy and blind

tiger will flourish. The speak-easy prospers only where easy officers rule. The blind tigers inhabit only those municipalities where blind officers reign, officers that are blind to duty and public obligation. Blind officers are not likely to reign two successive terms unless there is a majority of blind voters, and there is not often a majority of blind voters in a community unless there is also a blind press.

We are surely justified in concluding, not that prohibition *will* prohibit, but that saloon prohibition *can be enforced,* and where it is done there is improvement in the financial, moral and criminal conditions of the people.

No more eloquent tribute can be paid to the happy and blessed conditions that will follow enforced prohibition than was done by Lincoln, in his temperance address, delivered in the Second Presbyterian Church of Springfield, Ill., February 22, 1842, when he said:

"Turn to the temperance revolution. In it we shall find a stronger bondage broken, a viler slavery manumitted, a greater tyrant deposed—in it, more of want supplied, more disease healed, more sorrow assuaged. By it, no orphans starving, no widows weeping; by it none wounded in feeling, none injured in interest. Even the dram-maker and dram-seller will have glided into other occupations so gradually as never to have felt the change, and will stand ready to join all others in the universal song of gladness. And what a noble ally this is to the cause of political freedom; with such an aid, its march can not fail to be on and on, till every son of earth shall drink in rich fruition the sorrow-quench-

ing draughts of perfect liberty! Happy day, when, all appetites controlled, all passions subdued, all matter subjugated, mind, all-conquering mind, shall live and move, the monarch of the world! Glorious consummation! Hail, fall of fury! Reign of reason, all hail!

"And when the victory shall be complete—when there shall be neither a slave nor a drunkard on the earth—how proud the title of the *Land*, which may truly claim to be the birthplace and the cradle of both those revolutions that shall have ended in that victory. How nobly distinguished that people who shall have planted and nurtured to maturity both the political and moral freedom of their species."

The only reasonable way to weigh prohibition is to ascertain the results of an enforced prohibitory statute, for, when we measure it by conditions prevailing, where the statute is not enforced, we draw our conclusions from conditions that do not result from prohibition, but, from the want or failure to have prohibition. Unenforced prohibition and free saloons are one and the same, and we should not judge enforced prohibition by the results of unenforced prohibitory statutes.

CHAPTER XIX

HIGH LICENSE A SUBTERFUGE

Even upon the basis of the extreme position, taken by the Indiana Supreme Court, in the Sopher case, that the saloon was made unlawful by the statute, in order to compel the person, who desires to sell, to secure a license for that purpose. A license is a permit, a privilege and a suspension of the criminal provisions of the statute. The position of the court makes the license a legalization of that which would, otherwise, be a crime. It is a means of compounding a misdemeanor. Upon the assumed theory, of the court, the license can not, in any sense, be a restriction or prohibition, because the statute first absolutely prohibited the saloon, outlawed it and made it a crime, and then, in order to make it exempt from this condemnation in certain instances, provides for a special privilege, springing alone from the provisions of the license statute.

So that, the license, whether it be high or low, is the root of the saloon evil. Then, we are up to the question of what advantage society can derive from charging a high fee for legalizing a crime. The state can not, certainly, afford to put itself in the attitude of legalizing crime for the sake of revenue. If so, then good financial judgment, would suggest the legalization of all offenses on the basis that will produce the most satisfactory revenue receipts.

However, the most ardent advocates of high license ordinarily disavow such an object, and argue that the purpose of the "high" fee is the restriction

of the saloon evils. The best answer is that, according to the Supreme Court, the evils were completely suppressed without the provision for any fee at all. But waiving that feature of the discussion, we shall run the red line of reason through the restriction theory. It is claimed that high license will restrict in, at least, two ways.

TWO CLAIMS FOR HIGH LICENSE

First, the claim is made that high license will reduce the number of saloons by driving out the low doggery and grog-shop. The casual observer will at once note that the statement does not intimate that high license will reduce the consumption of liquor. If we are to continue the saloon policy, and, yet desire fewer of them, the logical and sensible method of reaching the intended result is to limit directly, by legislation, the number of saloon licenses that may be granted to a given population. The courts have repeatedly held that such legislation is valid, as against the saloon, upon the ground that, as the saloon may be prohibited entirely, those engaged in the traffic have no just complaint if the legislature fails to do all that it may do.

We may here, parenthetically, say that such holdings are not founded on the theory that the saloon is lawful and has the same legal footing as the useful avocations of life. The United States Supreme Court has said that a statute that would attempt to provide that only a certain per cent. of citizens might practice law, or medicine, or farm, or engage in the mercantile pursuits, or the carpenter trade, etc., would be void. If a reduction in the number of

saloons be desired and the result may be accomplished by direct legislation, what sensible excuse can be offered for going around "Robin Hood's barn" to it. Experience has clearly demonstrated that there is much difficulty encountered in the enforcement of direct legislation. It will certainly be much more difficult to accomplish the desired results by indirection.

If, from the standpoint of the public good, there is to be a distinction made between the so-called respectable saloon and the low dive, the public welfare will demand the elimination of the alleged respectable saloon. The low dive, without the aid of the "respectable" saloon, will soon die of starvation. The high-class, society saloon is the feeder of the doggery. Men do not begin to drink in the doggery. They begin in the "genuine" clubs and saloons that are given a semblance of public approval and respectability, and they finish at the "grog-shop" after they have passed down all the grades of the imagined "respectable" saloon.

The dive is the place of "graduation." We will have no "graduation" in the low school, if no one shall pass down the grades to it. The best plan to dispense with the "quitters" is to stop the "beginners." If there shall be no matriculation, there will be no occasion for graduation. Close the place where a man begins to be a drunkard, and you will thereby close the place where he is finally kicked out to the jail, the poorhouse and the insane asylum.

The doggery is merely the "tail-end" of the machine that discharges the finished product, the drunkard in his delirium, that was fed into the

cylinder, the society saloon, as a specimen of pure, honest, sober manhood. He went in as the wheat of citizenship. He comes out a thug, the chaff of the straw-stack of a wrecked and ruined life. To prevent his coming out, stop him from going in.

A sad experience has unquestionably demonstrated that high license does not drive out the low dive. The dive can not be closed so long as the high license saloon prepares men for the dive. High license gives to the saloon a financial intrenchment that deadens public sentiment and public conscience, and paves the way to a wide-open policy and a greater violation of law.

WILL HIGH LICENSE ELIMINATE THE BREWERY SALOON?

Just how high a license within itself will eliminate the brewery saloon has never fully been explained by the high license advocates. In fact, no explanation has ever been attempted. The whole matter rests upon the empty assertion that high license will rid the state of the brewery saloon. No brewery can lawfully conduct a saloon now. No corporation, except a railroad company, can secure a license under the statutes of Indiana. The statute of Indiana provides that "a license shall be granted or issued in no case to any person other than the actual owner or proprietor of the business." A brewery company can not lawfully hold a license itself and to hold a license in the name of some other person for its benefit is not authorized by statute, but is prohibited thereby.

Indisputable information gathered by the State Statistician of Indiana discloses beyond per adventure of a doubt that about one-third of the saloons in Indiana are brewery saloons. The licenses are held by agents and employees of breweries, and bonds are signed by brewery officers and agents, and, sometimes, by brewery corporations. According to official figures of the State Statistician there were granted in Indiana between January, 1907 and July, 1907, three thousand and two saloon licenses. Of these, two hundred and seventy-four were bonded by breweries, seven hundred and seventeen were bonded by brewery agents and sixty of the saloons are reported directly as being owned by breweries. During the six months between January 1, 1907 and July 1, 1907, four hundred and seven saloon licenses were granted in Marion County, in which Indianapolis is located, according to the State Statistician. Two hundred and thirty-two gave bonds with breweries as sureties and one hundred and seventy of them gave bonds with brewery agents as sureties, leaving only five that were not directly or indirectly brewery saloons.

It is not one of the rights of brewery corporations to execute bonds. The statute authorizing such corporations does not provide that they shall have the power to execute bonds as sureties. If the present statute be enforced the brewery saloon may be closed. If additional legislation is desirable in order to more effectually provide a means of closing the brewery saloon, the legislation should be direct, and not indirect, under the guise of high license.

High license is a subterfuge, pure and simple, intended to detract and divert attention from the evils of the saloon. It is an invention of the saloon-bossed politician to salve the public conscience and intrench the saloon for another decade. It is not in any sense a temperance measure. It is a compromise that is always interposed by the saloon forces against a demand for local option or absolute saloon prohibition.

Sam Small says: "High license was invented by the devil and patented by the politicians to coin dollars to lay on the eyes of dead consciences to make 'em look respectable."

And, we add, endorsed by the liquor traffic as an efficient means of evading the rising tide of saloon-annihilation sentiment. The best proof of this proposition is the statements of the traffic itself. As proof of the assertion, we call attention to some of the declarations of liquor organs and apostles.

The Bar says: "A good high license to help pay their taxes will pacify their conscience; nothing else will.

Brewers Journal,—"High license reforms nothing, and, where it has been given a fair trial, it has been to the liquor dealer eminently satisfactory from a financial point of view."

J. M. Atherton, ex-president of the National Protective Association, an organization of distillers and wholesale liquor-dealers,—"The true policy of the liquor trade to pursue is to advocate as high a license as they can, in justice to themselves, afford to pay. This catches the ordinary tax-payer, who cares less for the sentimental opposition to our busi-

ness than he does for taxes upon his own property. The most effective weapon with which to fight prohibition is high license."

Bowler Brothers (brewers) Worchester, Mass.,—"Your battle cry must be high license versus prohibition."

Deversean and Mersede, liquor dealers of Boston, in a published letter say: "Advocate high license. Don't think that you can silence the pulpit, but you *can* induce them to advocate high license on moral grounds."

Peter Iler, a Nebraska brewer,—"High license does not hurt our business, but, on the contrary, has been a great benefit to it. I believe somewhat that high license acts as a bar against prohibition. I do not think high license lessens the quantity of liquor used."

A FEW THINGS THAT THE ATTORNEY GENERAL CAN DO

If the principles of law approved in the cases of Columbia Club vs. State, 143 Ind. 98, and State vs. French Lick, etc. Co. and State vs. West Baden etc. Co. 82 N. E. Rep. 801, should be invoked by the Attorney General against the brewery saloons, these saloons can not only be closed, but the charters of the brewery corporations operating them may be forfeited and their property placed in the custody of receivers.

The Supreme and Appellate Courts have both said a saloon, operated without a license, is a public nuisance per se. If this principle should be applied, or the blind tiger statute or the rule of law, approved

in the French Lick case, should be enforced, the clandestine saloon on the Monument Circle in Indianapolis, almost within the shadow of the State House, and operated in the club building of a political party professing to stand for the principles of Lincoln, can be closed, and the public convinced that political party influence does not control the administration of public office.

In this club building, the criminal liquor statutes of the state are openly and flagrantly violated every day in the year. To enforce the law against this organization, may, as a party policy, be like the revision of the tariff. It may be too late to do it before the election and too early to do it afterward.

CHAPTER XX

SOLTAU VS. YOUNG

The following is a complete, verbatim copy of the opinion of Judge Artman in the case of Albert Soltau vs. Schuyler Young:

"At the January session, 1907, of the Board of County Commissioners of Marion county, Albert Soltau filed his application for a license to sell intoxicating liquors at retail in the tenth ward of the city of Indianapolis. Schuyler Young and William J. Trefz, voters of said ward, appeared before said board and filed their remonstrance. Such proceedings were had before the board that a license was granted to the applicant, and, from this order of the board, the remonstrators appealed to the Marion Circuit Court. From that court the case came to this court on a change of venue.

Right to License Denied

In this court the remonstrators have filed what they term an amended remonstrance, in which they deny the right of the board of commissioners and also of this court to grant such a license, for the following reasons:

First—Because said board of commissioners did not have jurisdiction over the subject matter of said application, and this court has not now jurisdiction over the subject matter of said application.

Second—Because the sale of intoxicating liquors at retail, to be drunk as a beverage, is destructive of the public morals, the public health and the public

safety, and is, therefore, inherently immoral and unlawful, and can not be licensed under the constitution of the state of Indiana, or the constitution of the United States.

Third—Because the sale of intoxicating liquors at retail, to be drunk as a beverage, upon the premises where sold, is destructive of public morals, the public health and the public safety, and is, therefore, inherently immoral and unlawful, and can not be licensed under the constitution of the state of Indiana, or under the constitution of the United States.

Fourth—Because Sections 7279, 7281, 7283 and 7284 of the Burn's Revised Statutes, 1901, and being license law of 1875, under which said license is sought to be granted, are unconstitutional as being in conflict with the spirit and purpose of the constitution of the state of Indiana, as set out in the preamble of said constitution.

Fifth—Because Sections 7279, 7281, 7283 and 7284 of Burn's Revised Statutes, 1901, and being license law of 1875, under which said license is sought to be granted, are unconstitutional as being in conflict with section one, article one of the constitution of Indiana.

Sixth—Because Sections 7279, 7281, 7283 and 7284 of Burn's Revised Statutes, 1901, and being license law of 1875, under which said license is sought to be granted, are unconstitutional as being in conflict with section one, article eight of the constitution of Indiana.

For which reasons the remonstrators pray that the application be dismissed.

This so-called amended remonstrance is nothing more nor less, in legal effect, than a motion to dismiss the application. To this amended remonstrance the applicant has filed a demurrer, alleging that the same does not state facts sufficient to constitute a good and sufficient remonstrance under the statute.

THE QUESTION AT ISSUE

Waiving all questions as to the form and sufficiency of the demurrer, the ultimate question for decision in this case is whether or not the sale of intoxicating liquors, at retail, for beverage purposes, can be legally licensed.

The court has no inclination to evade or side-step this proposition. The conclusions at which it has arrived have been reached after long, patient and mature deliberation and the most careful consideration that the court is capable of giving the question.

THE STATUTE ON THE SUBJECT

It must be conceded at the outset, that there is a statute of the state purporting to authorize such a license. Burns' Revised Statutes, 1901, Section 7276 et seq. It is not every act of the legislature that is the law. Only the valid acts of the legislature are law. It necessarily follows that the decision of the ultimate question involves the determination of the validity or invalidity of this license statute. To insure a logical and intelligent discussion of this question, it is well to first ascertain and state the basis upon which it is to be determined.

It may be considered as settled, that this statute was enacted in strict accordance with all constitu-

tional formality, and hence the question of its validity will not be measured by the standard of constitutional formalities.

AUTHORITY OF THE LEGISLATURE

Did the legislature have the authority to enact the statute? Can the legislature authorize the licensing for a consideration, of the sale of intoxicating liquors, at retail, for beverage purposes? This is the basis upon which the ultimate question is to be determined. It is a question of power, and not one of formality.

It is contended by counsel for the applicant that the right of the legislature to authorize the granting of a saloon license is absolute and unqualified under the police power of the state.

In other words, he contends that this alleged right is to be measured by the fundamental principle of government, technically called the police power.

DEFINITION OF POLICE POWER

It is, then, proper, in order that we may be fully understood in this discussion, to ascertain as nearly as possible what is meant by the police power of the state. This principle of government or power is, after all, not very easily defined. It may be said to be the power to enforce the right and prohibit the wrong. It is the power to enforce the chief end of organized government, which is the preservation and development of the good order, the peace, safety, health, morals and welfare of the people.

In the case of the State vs. Gerhardt, 145 Ind. 451 the court said:

"The police power of a state is recognized by the courts to be one of wide sweep. It is exercised by the state in order to promote the health, safety, comfort, morals, and welfare of the public. The right to exercise this power is said to be inherent in the people in every free government. It is not a grant, derived from or under any written constitution."

SELF PROTECTION CHIEF END OF GOVERNMENT

Accepting this declaration as correct, which we must, the police power is, then, the inherent right in the people of every free government, to promote the health, safety, comfort, morals and welfare of the people. The right being inherent, it does not depend upon the language of the written constitution. Self protection is the chief end of organized government, and there is inherent in every free government, without regard to the language of the written constitution, the power to promote the health, safety, comfort, morals and welfare of the people, and, this being true, just ordinary common sense suggests the corollary proposition, that there is inherent in every free government, without regard to the language of the written constitution, a prohibition against doing anything that naturally and necessarily endangers the health, safety, comfort, morals and welfare of the people.

This gives the question, involved in this case, as wide a range, if not wider, than contended for by the remonstrators. In other words, there is contained in this inherent power and prohibition of

government all, if not more, than there is in the specific provisions of the constitution set out by the remonstrators. To determine this question from the police power standpoint necessarily determines it from the constitutional standpoint.

Hence we accept the challenge of counsel for the applicant to discuss and determine the question in this case from the viewpoint of the police power.

THE FUNCTION OF OUR GOVERNMENT

By section one of the Bill of Rights it is declared that the government of this state is instituted for the peace, safety and well being of the people. This is merely expressing in written language the inherent power of the state to provide for the self-protection of its constituent members; it is merely a direct expression of the scope of the police power. While it is denominated the "Bill of Rights," it is equally the "Bill of Wrongs," because, when the people have thus expressed the ends to be attained by organized society, they, in legal effect, declare a prohibition against anything that will naturally and inherently endanger the accomplishment of those purposes.

Counsel, in his argument, defined the police power to be the power of the state to preserve the peace, promote good morals, restrain vice and protect the property and health of the people. It must be conceded that this is a fair definition. This court will not even criticise in the slightest degree this definition, but, in this connection, we desire to call attention to some others.

In the case of the State ex rel George vs. Aiken,

26 L. R. A. 352, the South Carolina Supreme Court, quoting from Section 24 of Black on Intoxicating Liquor, said:

"It cannot be doubted, however, that the origin of this power must be sought in the very purpose and framework of organized society. It is fundamental and essential to government. It is a necessary and inherent attribute of sovereignty. It antedates all laws, and may be described as the assumption on which constitutions rest; for the state, whether we regard it as an association of individuals, or as a moral organism, must have the right of self-protection, and the power to preserve its own existence in safety and prosperity, else it could neither fulfill the law of its being nor discharge its duties to the individual. And to this end it is necessarily invested with power to enact such measures as are adapted to secure its own authority and peace, and preserve its constituent members in safety, health and morality. Theories of the state, according as they tend to enlarge or restrict the legitimate sphere of its functions and activities, will create theories as to the proper limitations of the police power. But its existence in a measure proportioned to the rights and duties it is to guard is implied in the recognition of the state as a factor in law and civilization. 'It is a power,' as has been said, 'essential to self-preservation, and exists necessarily in every well organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity.' For these reasons, it appears that the nature and authority of the police power are best described by the maxim,

'Salus populi suprema lex.' " In other words, the public good is the supreme law.

And it must follow as a logical sequence, that whatever contravenes this law of self-preservation, by being destructive of the good order, the safety, the peace, the health, the morals or the welfare of the people, is unlawful.

LEGAL STATUS OF THE SALOON BUSINESS

What is wrong cannot be lawful and whatever is right is legitimate and lawful. In the absence of any license statute, what is the legal status of the saloon business? Does it stand upon the same basis as the business of the farmer, the manufacturer or the merchant?

In other words, is it one of the inherent, common law rights of citizenship to engage in the saloon business? Upon this question courts of last resort and of eminent attainments, have taken different views. In fact, the Supreme Court of Indiana has answered the question in both the affirmative and the negative.

In this confusion of authority, it then becomes the duty of this court to follow that which, in its judgment, is founded upon the better reason. In the cases of Welsh vs. the State, 126 Ind. 72 and Haggart et al vs. Stehlin et al, 137 Ind. 43, the court holds that a person in selling intoxicating liquors is only exercising his common law right. In each of said cases the court holds the license statute to be a restriction upon this common law right, and justifies the license upon the ground that it is a limitation and not a privilege.

In the former case the court says: "That the unrestricted sale of intoxicating liquors results in much evil and is detrimental to society," and in the latter it says: "The license law treats the traffic as dangerous, as dangerous to public and private morals and as dangerous to the public peace and the good order of society." The position of the court in these cases is that it is one of the inherent, inalienable, common law rights of citizenship to engage in a business that results in much evil and is detrimental to society; a business that is dangerous, dangerous to public and private morals and is dangerous to the public peace and the good order of society, and that a license from the state to engage in the business is a restriction and not a privilege.

In a later case, the State vs. Gerhardt, 145 Ind. 439, the same court approves the position of the court in the two previous cases as to the evil results of the liquor traffic, but takes an entirely different view of the common law right to engage in the business and of the effect of a license. Upon the nature of the traffic the court, in this case, says: "The unrestricted traffic in intoxicating liquors has been found, by sad experience, to be fraught with great evil, and to result in the most demoralizing influence upon private morals, and the peace and safety of the public."

Upon the common law right to engage in the business, the court, on page 462, cites Sherlock vs. Stuart, 96 Mich. 196, and Black on Intoxicating Liquors, Section 48, and says:

"The principle upon which is based the regu-

lation of the liquor traffic is found in the police power of the state, and it should be remembered, in construing all statutes on that subject, that no one possesses an inalienable or constitutional right to keep a saloon for the sale of intoxicating liquors.

"To sell intoxicating liquors at retail is not a natural right to pursue an ordinary calling."

In the case of Boomershine vs. Ulime, 159 ville, 163 Ind. 512, the Indiana Supreme Court affirms this proposition, using the identical same language, citing the same authorities and quoting, in addition, from the case of Crowley vs. Christenson, 137 U. S. 86.

Again in the case of Jordan vs. City of Evansville, 163 Ind. 512, the Indiana Supreme Court says: "To sell intoxicating liquor at retail is not a natural right to pursue an ordinary calling."

Upon this same question, the Supreme Court of South Carolina, in the case of the State ex rel George vs. Aiken, 26 L. R. A. 345, said: "Liquor, in its nature, is dangerous to the morals, good order, health and safety of the people, and is not to be placed on the same footing with the ordinary commodities of life, such as corn, wheat, cotton, potatoes, etc."

In the case of Mugler vs. Kansas, 123 U. S. 205, the Supreme Court of the United States declares that the right to manufacture and sell intoxicating liquors does not inhere in citizenship.

In the case of Crowley vs. Christenson, 137 U. S. 86, the Supreme Court of the United States, said: "There is no inherent right in a citizen to thus sell intoxicating liquors at retail; it is not a

privilege of a citizen of the state or a citizen of the United States."

See also Cronin vs. Adams, 192 U. S. 108, in which the last quotation is cited and approved. The privilege to engage in the business, as an inherent or common law right of citizenship, is denied in these cases upon the ground that the business is attended with danger to the safety, peace, good order, morals and welfare of the community. This court is of the opinion that this is the sound doctrine, for government was organized for the very purpose of promoting the safety, peace, good order, health, morals and welfare of the people, and it logically follows that citizenship within itself confers no right upon any person to do anything that is destructive of the fundamental purpose of government. If, then, the privilege to engage in the saloon business is not a right of citizenship, and we hold that it is not, it must be acquired from some other source, if it exists at all. This proposition is axiomatic.

COMMON LAW PROHIBITION PREVAILS

The quintessence of all these holdings is that, when measured by the common law, the saloon business is unlawful, and, therefore, without a legal existence. In other words, in the absence of a statute legalizing the business, common law prohibition prevails.

On this question the Supreme Court of Illinois, in the case of People ex rel Morrison vs. Creiger, 28 N. E. 812, says: "The right, therefore, to engage in this business and to be protected by the law in its prosecution, can no longer be claimed as

a common law right, but is a right which can be exercised only in the manner and upon the terms which the statute prescribes. It also follows that to adopt the policy of prohibition requires no affirmative action on the part of the authorities authorized to provide and grant licenses. Mere non-action of itself, on their part, results in prohibition."

Upon all this I am certainly justified in saying that common law prohibition exists and prevails, except when revoked and nullified by statute. This adjudication by the courts that the saloon business is unlawful and prohibited by the common law has been brought about by an incessant warfare, waged by the liquor interests against the statute under consideration and other statutes of similar character, against which it was urged, by the saloon men, that intoxicating liquor stood upon the same footing as breadstuffs and other necessities of life and that the saloon business was just as legitimate and lawful as the business of the farmer, the merchant and the mechanic. In answer to this contention, the courts are now practically agreed upon the judgment that intoxicating liquor does not stand upon the same footing as breadstuffs and that the saloon business, because it naturally and inherently endangers the health, the life, the comfort, the safety, the morals and the welfare of the people, is inherently unlawful and is prohibited by the common law.

BATTLE LOST TO SALOON MEN

Having lost more in this battle than they ever anticipated, meeting with complete defeat and utter

rout from their position, the saloon men now seek protection from and endeavor to establish a legal existence under the very statutes against which they have waged an unrelenting warfare for over fifty years. On the other hand, the temperance champions have awakened to a realization that they have gained more in the battle than they hoped for.

VICTORY FOR TEMPERANCE CHAMPIONS

Having secured from the courts the adjudication that the saloon business is unlawful and prohibited by the common law, they now attack the statute and claim that the legislature has no power to authorize the licensing of an inherently unlawful business at common law, and especially a business that has been adjudged, by the courts, to be unlawful and prohibited by the common law.

Their contention is that the business, not having the right to exist on account of citizenship and having been adjudged to be unlawful, when measured by the common law, must be deemed to be prohibited unless it be legalized by the legislature. And the conclusion is surely the inevitable, logical result of the adjudications of the courts.

In the case of the State ex rel George vs. Aiken, 26 L. R. A. 353, the Supreme Court of South Carolina, says: "The licensed saloon keeper does not sell liquor by reason of an inalienable right, inherent in citizenship, but because the government has delegated to him the exercise of such right." In other words, a license to sell intoxicating liquors is a privilege, and not a restriction. This is the

present position of both the supreme and appellate courts of Indiana.

The State vs. Gerhardt, 145 Ind. 439, see page 467.

Nelson vs. the State, 17 App. 403, see page 406.

A PRIVILEGE NOT LEGALIZED

As relates to a legitimate profession, industry or business a license may be required as a regulation, but as relates to a profession, industry or business, which cannot be engaged in as a common law right of the citizen, a license to engage therein must be regarded as a privilege. In such cases, a license is a permission granted by some competent authority (if it can be granted) to do an act, which without such permission would be illegal. The State vs. Hipp, 38, Ohio State 226. So that a license to engage in the sale of intoxicating liquor legalizes (at least attempts to) the business to the extent that it authorizes it. The State vs. Hipp supra, page 233.

POWER OF THE STATE

In other words, regulation implies legal existence. Upon this very question, the Supreme Court of Michigan, in the case of Sherlock vs. Stuart, 21 L. R. A. 586, said: "The power to regulate assumes the existence of the traffic. Suppression is not 'regulation,' but prohibition. The words 'regulate' and 'prohibit' are not synonymous." See cases cited. Then, before the saloon business can be regulated, it must be legalized, if it can be. It may be suppressed or prohibited, because it is

unlawful at common law. It follows, as a matter of logic, that, as a measure of police protection, looking to the preservation of public morals, a state may prohibit the manufacture and sale of intoxicating liquors.

Bartmeyer vs. Iowa, 85 U. S. 129.
Boston Beer Co. vs. Massachusetts, 97 U. S. 33.
Mugler vs. Kansas, 123 U. S. 205.
Crowley vs. Christenson, 137 U. S. 86.

CAN STATE LICENSE SALOON?

But the question this court has to decide in the case at bar is, can the state, under the guise of a police regulation, looking to the preservation of public morals, license the saloon business?

Counsel for the applicant answers this question, first by asserting that it is the exclusive province of the legislature to determine what measures are appropriate and needful for the protection of the public morals, the public health and the public safety, and that its determination of the question and the character of the measure can not be inquired into by the courts. That any enactment of the legislature as an ostensible exercise of the police power, no matter what may be its character, is absolutely immune from any investigation by the courts. If this proposition be sound, then it follows that the legislature may license the saloon business even though the effect be to destroy rather than to protect the public morals, the public health and the public safety, and here is the place to punctuate with a period and close the discussion.

This court can not give its assent to this proposition.

In the case of Calder vs. Bull, 3 Dallas, 386, Judge Chase, speaking for the United States Supreme Court, said: "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the state. The purposes for which we enter into society will determine the nature and ends of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. There are acts which the federal or state legislature can not do without exceeding their authority. An act of the legislature (for I can not call it a law) contrary to the first great principles of the social compact, can not be considered a rightful exercise of legislative authority. The legislature may enjoin, permit, forbid and punish, and establish rules of conduct for all citizens in future cases; they may command what is right and prohibit what is wrong, but they can not change innocence into guilt." And Judge Chase might have very appropriately added, "they can not change inherent wrong into right."

Again in the same case he says: "The genius, the nature, and the spirit, of our state governments amount to a prohibition of such acts of legislation: and the general principles of law and reason forbid them.

"To maintain that our federal or state legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political

heresy, altogether inadmissible in our free republican governments."

The Supreme Court of Indiana in the case of State vs. Gerhardt, 145 Ind. 452, on this same question said: "It [the police power] is not, however, without limitation, and it can not be invoked so as to invade the fundamental rights of a citizen. As a general proposition, it may be asserted that it is the province of the legislature to decide when the exigency exists for the exercise of this power, but what are the subjects which come within it, is evidently a judicial question."

We have already shown that the courts generally have adjudged the saloon business to be unlawful at common law, because it invades the fundamental rights of citizens. Upon this same question the Supreme Court of Illinois, in the case of Ritchie vs. People, 40 N. E. 454; 29 L. R. A. 29, said: "The legislature can not so use that power as to invade the fundamental rights of the citizen; and it is for the courts to decide whether a measure, which assumes to have been passed in the interest of public health, really relates to, and is convenient and appropriate to promote, the health."

See also: Columbia, etc. Club vs. State, 110 Ind. 98; Douglass vs. Commonwealth, 100 Ky. 116; Stone vs. Mississippi, 101 U. S. 814.

Upon the very question in the case of Mugler vs. Kansas, 123 U. S. 210, the Supreme Court of the United States said: "It does not at all follow that every statute enacted ostensibly for the promotion of those ends is to be accepted as a legitimate exertion of the police power of the state. There

are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, Sinking Fund Cases, 99 U. S. 718 (23; 501), the courts must obey the constitution, rather than the law-making department of government, and must, upon their own responsibility, determine whether in any particular case, these limits have been passed. "To what purpose," it was said in Marbury vs. Madison, 5 U. S. Cranch, 137, 167 (2; 60, 70), "are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation." The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty —indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

This court is inclined to and will accept this as the correct statement of the law upon the question.

UNRESTRAINED TRAFFIC MAY BE TREATED AS A NUISANCE

As a second reason why the court should not lay hands upon the saloon license statute, counsel for the applicant contends that to strike down this statute would subject society to the innumerable woes and vices of an unrestrained liquor traffic, without any means of protection; that, in such a case, there would be no criminal law by which it can be suppressed.

Admitting, but not deciding this last statement to be true, yet the position of counsel is not well balanced. The effect of counsel's position is to maintain that an unlawful business must be legalized before it can be suppressed. If it were legalized, the most that could be done would be to regulate and control it as a lawful business, but, treating it as unlawful, it can be suppressed, abated, prohibited and absolutely annihilated, and this can be effectually done without any criminal statute.

It is the settled law of the land that any occupation that naturally and inherently endangers the health, peace, safety, morals and welfare of the people is unlawful and a public nuisance.

Wood on Nuisance, Sec. 24.

State vs. Tabler, 34 Ind. Ap. 393.

A public nuisance may be abated, under the civil law, by injunction, and, if the nuisance keeper fail to obey the injunction, he must face the court for contempt. In all probability, this remedy would be preferable to criminal proceedings.

So, this contention, in my judgment, presents no legal obstacle to an inquiry as to the validity of the

saloon license statute, for common law prohibition can be enforced and society protected without a criminal statute. If a criminal statute be necessary, it is the duty of the legislature to provide it. The failure of the legislature to do its duty should not deter the court from the discharge of its sworn obligation.

NOT A COMMON LAW PRIVILEGE

Is the licensing of the saloon business an invasion of the fundamental law? We have already determined that a person can not engage in the business as an inherent, common law privilege of citizenship, because the business is treated as dangerous to the public health, public morals and public safety. We have also reached the conclusion that a license to engage in the business legalizes the traffic (if it can be legalized) to the extent that it authorizes it. Can the legislature legalize the destruction of the public health, the public morals and the public safety? Can the legislature make lawful, for a price, that which is unlawful, because it contravenes the fundamental principle of government? Surely not.

In the absence of a license, the police power of the state regards any business, the inherent character, tendency and effect of which is to destroy the public health, the public morals or the public safety, as immoral and unlawful.

This is what the cases, heretofore cited, mean by holding that the right to engage in the sale of intoxicating liquors is not a common law privilege, inherent in the rights of citizenship.

It is not a right of citizenship, because, as the cases hold, its existence is detrimental to society and is dangerous to public and private morals and to the peace and good order of society.

This court might rest its decision of the case at bar upon the holding of the cases cited, that the sale of intoxicating liquors is detrimental to society and dangerous to public and private morals, and, for that reason, is unlawful, at common law. To so restrict the decision, would, of course, assume that this holding of these cases is well founded.

JUDICIAL ESTIMATES OF THE SALOON

In order to disclose more fully the foundation for this holding, I quote from some of the leading cases, the declarations of the courts, as to the character and effects of the saloon business:

Supreme Court of Kansas in State vs. Durien, 80 Pac. 987: "The commodity in controversy is intoxicating liquor. The article is one whose moderate use, even, is taken into account by actuaries of insurance companies, and which bars employment in classes of service involving prudent and careful conduct—an article conceded to be fraught with such contagious peril to society, that it occupies a different status before the courts and the legislatures from other kinds of property, and places traffic in it upon a different plane from other kinds of business. It is still the prolific source of disease, misery, pauperism, vice and crime. Its power to weaken, corrupt, debauch and slay human character and human life is not destroyed or impaired because it may be susceptible of some inno-

cent uses, or may be used with propriety on some occasions. The health, morals, peace and safety of the community at large are still threatened."

Supreme Court of Iowa in Santo vs. State, 2 Iowa 164: "There is no statistical or economical proposition better established, nor one to which a more general assent is given by reading and intelligent minds, than this: that the use of intoxicating liquors as a drink, is the cause of more want, pauperism, suffering, crime and public expense than any other cause—and perhaps it should be said than all other causes combined. Even those who are opposed to restriction, oftentimes admit this truth. Every state applies the most stringent legal power to lotteries, gambling, keeping gambling houses and implements, and to debauchery and obscenity, and no one questions the right and justness of it; and yet how small is the weight of woe produced by all these united, when compared with that which is created by the use of intoxicating drinks alone."

Supreme Court of Missouri in State vs. Bixam, 62 S. W. 828: "The evils that result from the use of intoxicating liquors generally occur at the place where they are consumed, and the tendency to crime and pauperism follows in that place, and it can readily be seen why a legislature would make a discrimination between the burden on a business which naturally breeds disorder, and which casts upon the general tax payer an additional burden in the cost of prosecutions and increased police force and a business which exports the intoxicating liquors to other states."

Supreme Court of South Carolina in State vs.

Turner, 18 S. C. 106: "Experience has demonstrated that the unrestrained traffic in spirituous liquors is dangerous to the peace and welfare of society, and, therefore, it has long been settled that the lawmaking power may throw such restraints around that traffic as in the judgment of that department of the government may be necessary to secure the peace and welfare of society."

Supreme Court of South Carolina in State ex rel George vs. Aiken, 26 L. R. A. 353: "We do not suppose there is a more potent factor in keeping up the necessity for asylums, penitentiaries and jails, and in producing pauperism and immorality throughout the entire country, than liquor, and yet it is argued that it is to be placed on the same footing with the breadstuffs and other ordinary commodities of life."

Supreme Court of Kansas in State ex rel vs. Crawford, 42 American Reports 186: "Probably no greater source of crime and sorrow has ever existed than social drinking saloons. Social drinking is the evil of evils. It has probably caused more drunkenness and has made more drunkards than all other causes combined, and drunkenness is a pernicious source of all kinds of crime and sorrow. It is a Pandora's box, sending forth innumerable ills and woes, shame and disgrace, indigence, poverty and want; social happiness destroyed; domestic broils and bickering engendered; social ties sundered; homes made desolate; families scattered; heartrending partings; sin, crime and untold sorrows; not even hope left, but everything lost; an everlasting farewell to all true happiness and to all

the nobler aspirations rightfully belonging to every true and virtuous human being."

Judge Gookins, of the Supreme Court of Indiana, in 1855, in Beebe vs. the State, 6 Ind. 542: "That drunkenness is an evil, both to the individual and to the state, will probably be admitted. That its legitimate consequences are disease and destruction to the mind and body, will also be granted. That it produces from four-fifths to nine-tenths of all the crime committed, is the united testimony of those judges, prison-keepers, sheriffs, and others engaged in the administration of the criminal law, who have investigated the subject. That taxation to meet the expenses of pauperism and crime, falls upon and is borne by the people, follows as a matter of course. That its tendency is to destroy the peace, safety and well-being of the people, to secure which the first article in the Bill of Rights declares all free governments are instituted, is too obvious to be denied."

Supreme Court of the United States in Mugler vs. Kansas, 123 U. S. 205: "It is not necessary, for the sake of jutsifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism and crime, which have their origin in the use or abuse of ardent spirits. For we can not shut out of view the fact, within the knowledge of all, that the public health, the public morals and the public safety may be endangered by the general use of intoxicating drinks; nor the fact established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil."

Supreme Court of the United States in Crowley vs. Christenson, 137 U. S. 86: "By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source."

CONDEMNED BY LEGISLATIVE ENACTMENT

The legislature of Indiana has enacted its condemnation of the business by requiring that the nature of alcoholic drinks and their effects on the human system shall be included in the branches to be regularly taught in the common schools of the state. R. S. 1901, 5984 a.

FRUITS OF THE LIQUOR TRAFFIC

It is not making the case too strong, to say that it is within the knowledge of every private citizen, of average information as to current events, that the business kills many, makes widows and orphans, fills almshouses, jails, penitentiaries, orphanages and insane asylums; that it frenzies the brain and directs the murderer's hand to plunge the fatal knife and discharge the deadly weapon.

The last sentence of the quotation from Crowley vs. Christenson, 137 U. S. will bear repeating: "The statistics of every state show a greater amount of crime and misery attributable to the use of

ardent spirits obtained at these retail liquor saloons than to any other source."

If the proposition that any business, the inherent tendency and effect of which is to destroy the public health, the public morals or the public safety is immoral and unlawful, is sound, it must follow, as the day follows the night, that the business, which is the source of a greater amount of crime and misery in every state, than any other cause, is the most immoral and the most unlawful business that there is in any state.

This is an inevitable conclusion from the premise. Logic will lead to no other result. So that the question for determination may now be stated in another form. Can the state sell the privilege or indulgence of producing the greatest amount of crime and misery? The natural tendency and effect of the saloon business is dangerous and detrimental to public and private morals and to the peace and good order of society, and because of this fact it contravenes the fundamental principle of self preservation and because it does this, it is unlawful and does not have the inherent right to exist. It can not legally exist at all, unless the state can sell and delegate to it the right of existence. The state is organized for the self preservation of its citizens in health, morality and safety. It is organized to enforce the right and prohibit the wrong. This is the paramount duty of the state to its constituent members, and it can not surrender the execution of it for a price. It is the imperative duty of the state to exercise the police power for the promotion and preservation of the public health, the public safety,

the public and private morals and the general welfare.

Blue vs. Beach, 155 Ind. 121.

City of Frankfort vs. Irwin, 34 Ap. 280.

By section one of the Bill of Rights, it is declared that the state of Indiana was founded for the peace, safety and well-being of the people, and, by section one of article eight of the state constitution, it is made the duty of the General Assembly to encourage by all suitable means, the moral and intellectual improvement of the people.

STATE CANNOT SELL PRIVILEGE TO PRODUCE CRIME AND MISERY

It would seem to follow logically that this imperative duty can not be discharged by delegating, for a money consideration, to an inherently unlawful and immoral business the right to exist and subject the citizens of the state to its baneful influence. Logic and reason must certainly treat such a delegation of right as a suspension rather than an exercise of the police power. The exercise of the police power can not be suspended or surrendered lawfully.

Blue vs. Beach et al, 155 Ind. 129.

The logic of all this must lead to the conclusion that the state can not, for a license fee, give the saloon business a legal standing.

The Supreme Court of Indiana has, in effect, so held. In the case of the Columbia Club vs. the State, ex rel McMahan, 143 Ind. 110, that court declared that a statute which should attempt to authorize prize fighting would be void. The language of the court is: "A statute which should attempt to

authorize prize fighting, would, most certainly, be opposed to the spirit of the constitution and, indeed, to that of the law itself, long since defined to be "A rule of civil conduct, prescribed by the supreme power of a state, commanding what is right, and prohibiting what is wrong." While prize fighting is odious and degrading, its evil influences are insignificant when compared with the destructive results of the liquor traffic. The Supreme Court of the United States has held that the saloon business is the greatest source of crime and misery that there is in any state—more than that, the greatest source in each state.

HIGHEST AUTHORITY CONDEMNS LESS INJURIOUS BUSINESS

The position of this court then is this: The highest judicial authority of the state has declared a less injurious business inherently unlawful, and beyond the power of the state to delegate to it a legal existence, and this court is now asked, in the face of this declaration, to hold that the business, which has been declared by the highest judicial authority in the nation to be the most unlawful business in any state, can be given a legal existence by the state, for a fixed consideration. This court will not walk into this dilemma. The law should be harmonious.

In the case of Commonwealth vs. Douglass, 100 Ky. 116, 24 S. W. Rep. 233; 66 Am. St. Rep. 328, the Court of Appeals of Kentucky, distinguished the exercise of the police power from contract obligations, holding that a license to conduct a lottery

was not a contract, but an attempted delegation of a right, which the state could not grant, because a lottery is vicious and demoralizing in the community. I quote from this opinion the following:

"The reason for this distinction must be apparent to all, for, when we consider that honesty, morality, religion, and education are the main pillars of the state, and for the protection and promotion of which government was instituted among men, it at once strikes the mind that the government, through its agents, can not throw off these trust duties by selling, bartering, or giving them away. The preservation of the trust is essential to the happiness and welfare of the beneficiaries, which the trustees have no power to sell or give away. If it be conceded that the state can give, sell and barter any one of them, it follows that it can thus surrender its control of all and convert the state into dens of bawdy houses, gambling shops and other places of vice and demoralization, provided the grantees paid for the privileges, and thus deprive the state of its power to repeal the grants and all control of the subjects as far as the grantees are concerned, and the trust duty of protecting and fostering the honesty, health, morals and good order of the state would be cast to the winds, and vice, and crime would triumph in their stead. Now it seems to us that the essential principles of self preservation forbid that the commonwealth should possess a power so revolting, because destructive of the main pillars of government.

The power of the state to grant a license to carry on any species of gambling, with the privilege of

revoking the same at any time, has an unwholesome effect upon the community and tends to make honest men revolt at the injustice of punishing others for engaging in like vices. We have, for instance, at this day, men confined in the state penitentiary for setting up and carrying on gambling shops whose tendencies are not much more demoralizing, if any, than the licensed lottery operator, who goes free under the protection of the law. The one wears a felon's garb, and the other is protected by license, which he claims as an irrevocable contract because he has paid for the privilege. The privilege ought never to be granted, and under the present constitution can never be. As said, to impress the privilege with the idea of contract because it was paid for, might fill the whole state, and especially the cities, with gambling shops and enterprises, protected by contract, and the few gamblers that might not be thus protected and who would be liable to be punished for gambling, would not be, because it would strike the honest man as unjust to punish the poor wretch for doing that which was made lawful for others to do by paying for the privilege."

To the same effect is the holding of the United States Supreme Court in the case of Stone vs. Mississippi, 101 U. S. 814, in which that court said: "The question is, therefore, directly presented, whether, in view of these facts, the legislature of a state can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature

can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both of these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

To the same effect in Ritter's Moral and Civil Law, Chap. X.

People ex rel etc. vs. Squire etc., 15 N. E. 820 and cases there cited.

In view of these holdings, based, as they certainly are, upon good reason and sound common sense, it must be held that the state can not under the guise of a license, delegate to the saloon business a legal existence, because to hold that it can is to hold that the state may sell and delegate the right to make widows and orphans, the right to break up homes, the right to create misery and crime, the right to make murderers, the right to produce idiots and lunatics, the right to fill orphanages, poor houses, insane asylums, jails and penitentiaries and the right to furnish subjects for the hangman's gallows.

HIGHEST COURTS HAVE PASSED MIDDLE OF STREAM

The Supreme Court of Indiana, the Supreme Courts of many other states and the Supreme Court of the United States have already so far passed the

middle of the stream upon the question involved in this case that return would now be more difficult than to go over. "Go over" is merely to draw the natural, logical and inevitable conclusion from the declarations and judgments of the courts. To return would mean either to abandon the adjudication that the saloon business is unlawful at common law, or to hold that a business which has been adjudged, by the courts to be unlawful, at common law, because it naturally and inherently endangers the health, comfort, safety, morals and welfare of the people, may be legalized for money. Some court may so hold in this case, but it will not be done by this court. If it is done by any court, it must be done by the court that has already held the business to be unlawful, because of its inherently destructive effects upon society.

AMENDED REMONSTRANCE SUSTAINED

With due appreciation of the responsibility of the occasion, conscious of my obligations, under my oath to Almighty God and to my fellow man, I can not, by a judgment of this court, authorize the granting of a saloon license, and the demurrer to the amended remonstrance is, therefore, overruled, the amended remonstrance is sustained and the application is dismissed at the costs of the applicant."

Note: The case of Soltau vs. Young was never appealed, and the decision rendered in said case, by Judge Artman, is in full force and effect.

CHAPTER XXI

RAILROADING THE SOPHER CASE

On April 13, 1907, in the circuit court of Hamilton County, Indiana, in the case of the State of Indiana vs. Edward Sopher, Judge Ira W. Christian, rendered an opinion holding that a retail liquor saloon is within itself a public nuisance, and that the statute, authorizing the licensing of the saloon, is unconstitutional, and, therefore, that the saloon license was no defense. This opinion was rendered upon a motion to quash the affidavit.

Following the rendition of the opinion, the defendant applied for and was granted a change of venue from Judge Christian. Reed Holloman, former Prosecuting Attorney, of the Boone Circuit Court, was appointed Special Judge to try the case. The trial was held on the 11th day of May, 1907, and, upon proof of the operation of the saloon, the judge found the defendant guilty of maintaining a public nuisance, saying in announcing the finding:

"The only question involved is whether or not the retailing of intoxicating liquors is so injurious to the public as to make the business a public nuisance. In view of the fact that nothing good comes from a saloon, except financial gain to the proprietor, it is in my mind purely a public nuisance. It is a nuisance because the results, both directly and indirectly, are bad. The saloon affects the man who goes in by robbing him of his character, his money, his reputation, and making of him, in many instances a criminal and a vagabond. Indirectly it affects his

family, who must suffer by reason of his abuse and his failure to provide. The saloon affects the public generally in the increased expense necessary for maintaining jails, penitentiaries, asylums and poor houses. In my judgment, a business whose consequences lead to such results is within the definition of a public nuisance, and therefore, amenable to the statute under consideration."

This was the ruling that determined the liquor forces to rush a case through the state Supreme Court. Within less than ninety days four different circuit judges had held that, by reason of the universally known evil character of the saloon and its inherently injurious effects upon society, as set forth in opinions of the highest courts of the states and the nation, the saloon is within itself unlawful, and, being so, it is beyond the power of the legislature to legalize it by a license. Two boards of county commissioners had taken the same view of the question and had refused to grant any saloon licenses. The sentiment was becoming alarmingly contagious, and the liquor interests of Indiana demanded of their friends, the political bosses, relief. The liquor organ published a fervent appeal under the title, "What Can We do to Be Saved."

The newspapers of the state that were bribed and subsidized by saloon notices and liquor advertisements declared that the "craze" had gone far enough. The self constituted guardians of good government in the state, composing the machine, whose special mission is and has been to dictate party platforms and nominations, and to prevent, if possible, the nomination of any man, not safe to

their interests, proclaimed that their supremacy was menaced and would be overthrown, if saloon domination must go.

On May 15, 1907, only four days after the decision of the Sopher case, the transcript of that case was filed in the Supreme Court, and on that very day, contrary to the custom and practice of both the supreme and appellate courts of the state, an order was entered advancing the case and requiring all briefs to be filed within a period of eighteen days. A day or two later an order was made for an oral argument of the case on the 6th day of June, the date being only twenty-two days after the record was filed in the Supreme Court.

This rush of proceedings would not attract attention, if it were not so out of harmony with the usual course of proceedings in the higher courts of Indiana. A few examples will disclose the variance. In Gillespie vs. State, 80 N. E. 829, in which the defendant had been convicted of first degree murder, for killing his twin sister, it required more than two years for the Supreme Court, in the usual course of events, to reach a decision. And this case is all the more illustrative, because of the fact that the court had previously had before it for consideration, in Gillespie vs. Rump, 163 Ind. 457, the very point upon which the case was finally determined.

The French Lick and West Baden cases are also good examples. In these cases, the state sought to forfeit the charters of certain hotel corporations on the ground that they were devoting their property to the conduct of unlawful and criminal pursuits, in the open, notorious and defiant conduct of

gambling. The place had become so notorious that it was known as and was commonly spoken of in the public press of Indiana and elsewhere as the "monte carlo" of the United States, thereby recognizing it as the rival of the Mexican monte carlo.

The trial court held against the state and the state appealed. The Attorney-General, as the representative of all the people, asked to have the cases advanced, but the request was promptly denied by the court, and it required about eighteen months to secure a decision of these cases.

But, in the Sopher case, in which the decision had been against the saloon and in favor of the people, the case was advanced on the day it was filed. On June 25, 1907, only forty days after the case was filed in the Supreme Court a decision, which had apparently been made before the case was filed in that court, was announced, in the Sopher case, reversing the decision of the trial court.

The entire course of events, from the filing of the record in the Supreme Court until it entered its decision of record, was of such a character as to mark the whole proceeding as the sheerest perfunctory formality. The demeanor of the judges, at the oral argument, was very indicative that the case had already been decided, and that a time had been set apart for the argument to be made, but not heard, to complete the chain of events between the placing of the file mark on the papers and the writing of the minutes announcing the decision. The Judges, at the oral argument, indulged in a fusilade of questions, very clearly demonstrating that they were not

in a judicial frame of mind. Some of their interrogations were close competitors of Mark Antony's most accomplished irony. Judge Hadley inquired of counsel for the state: "Are you able to tell this court the difference between a man's inherent right to ride on horseback and his inherent right to sell whisky at retail?" To those who know Judge Hadley personally, it is very apparent that this question was not asked in seriousness but in a vein of ridicule. If the question was in earnest, the answer would be easy. The difference is merely the difference between right and wrong. It is not harmful to society to ride on horseback, it may be very beneficial; but it is always detrimental to society to keep a saloon. The courts say that the saloon is an evil without a single redeeming feature, the propogator of crime and the dispenser of misery and suffering; but nobody ever dreamed of such things being the natural results of horseback riding.

The courts have declared that, because of its certain dangers to society, no man has the privilege or a constitutional, an inalienable, an inherent or a natural right to keep a saloon, but no such judicial denouncement has ever been made of horseback riding. No man has any of these rights to keep a saloon, because the saloon is harmful and unlawful. Every person has each of these rights to ride horseback, because horseback riding is harmless and lawful.

Judge Jordan asked: "Has it not been the policy of this court for more than fifty years to hold saloon license statutes to be constitutional and is not the court now bound by its many decisions to this effect?

Is not the question thereby foreclosed?" A sufficient answer ought to be that the courts have declared over and over again that no question involving a principle of governmental right is ever settled until it is decided right.

A conclusive answer to Judge Jordan would certainly be the fact that the Supreme Court of Indiana, at a time when he was a member of the bench and with his concurrence, has said: "In deciding so grave a question as the constitutionality of an act of the legislature, involving no property or contract right between the parties, the rule of stare decisis (the rule of following previous decisions) does not require that we should be bound by even our own former decisions. In such a case, the correct rule for a supreme court, supreme in the majesty of duty as well as supreme in the majesty of power is, as said by the Supreme Court of Georgia: 'Let this decision be right, whether other decisions were right or wrong.' "

Judge Gillett inquired: "Do you mean that the court should look upon the matter as a strictly legal proposition without any regard whatever to the will of the people as expressed by the legislature?"

It should certainly be looked upon as a strictly legal proposition. Neither the people nor the legislature can legally have any will at variance with the fundamental rights of citizens.

Upon this very question, the eminent jurist, Secretary-of-War Taft said: "The courts, and especially the Supreme Court of the United States, are the part of our government indispensable in making

good those guarantees of life, liberty, property, and the pursuit of happiness, given in the Constitution and placed there by the people themselves to curb their own hasty action under stress of sudden impulse or with too little deliberation."

And then, above all, in an opinion written by Judge Gillett himself, the Supreme Court of Indiana has said: "There is, and always will be, in every representative government, a struggle going on between the various interests of society with reference to legislation. This but evinces the necessity for the existence of a co-ordinate branch of the government, also acting under the responsibility of an oath, to determine, when called upon to enforce legislation, whether it operates unequally."

And this means to ascertain, as a legal proposition, whether the legislation is an invasion of the equality rights of citizens. But, the question most clearly indicating that the court intended to apply a different legal proposition to the saloon than it applies to other pursuits of like character was put by Judge Montgomery, when he asked: "But, is it not the province of the legislature, not the courts, to determine, from a legal point of view, what is right and what is wrong, what is moral and what is immoral?" Not conclusively so. Certainly not. For illustration, suppose that a state legislature would declare prostitution to be right and moral. Would it be so legally? Certainly not. And, when it was not dealing with the political power and influence of the saloon, the Supreme Court of Indiana did not take the position that it did not legally and judiciously know the difference between morality and immor-

ality, but assumed that it did know the difference.

Prior to the 1907 session of the general assembly of Indiana there was no legislative enactment declaring "bucket shop" or "option" gambling to be wrong or immoral. In the case of Western Union Telegraph Co. vs. State, 165 Ind. 492, the Supreme Court of the state, in an opinion written by Judge Montgomery, declared "Bucket shop" gambling to be wrong, immoral and unlawful. The Court, speaking by Judge Montgomery, said: "We have no statute denouncing option gambling as a crime, but contracts for the purchase and sale of commodities, not to be delivered, but only to be performed by advancing and paying differences, are void at common law, in the absence of a statute."

"The mischief and evil consequences resulting to the state from the operations of the bucket-shop are almost beyond computation. It assumes an air of legality and respectability, and insidiously ensnares many innocent victims before the public learn of their danger. Its nefarious practices are directly responsible for innumerable bankruptcies, defalcations, embezzlements, larcencies, forgeries and suicides. It ought to be outlawed by statute, as its existence is a menace to society, and its operations immoral, contrary to public policy and illegal."

If it belongs exclusively to the legislature to determine whether a pursuit is unlawful, immoral or wrong, the court should have said in this case: "We do not know. Submit the question to the legislature, and, if it declares it to be wrong, we will then know it is wrong; if it declares it to be right, we will then know that it is right; if it de-

clares it to be moral, we will then know that it is moral; if it declares it to be immoral, we will then know it is immoral; if it declares it to be lawful, so must we; if it declares it to be unlawful, then we may." But the court did not put itself in this ridiculous attitude. It declared that it knew "bucket-shop" gambling" to be a menace to society, and for that reason unlawful.

It is a menace to society because its most natural results are bankruptcies, defalcations, embezzlements, larcencies, forgeries and suicides. To determine the legal status of bucket-shop gambling, in the absence of legislation, Judge Montgomery and the Supreme Court, measured it by its probable effects upon society. This is certainly the correct and sensible rule. If, in its native state, previous to legislative recognition, the judge and the court, were to measure the saloon by the "bucket-shop" rule, they would surely reach the same conclusion.

However, in Greencastle vs. Thompson, 81 N. E. 497, the Supreme Court of Indiana, speaking by Judge Montgomery, said: "In the absence of legislation, the business of selling intoxicating liquors has universally been recognized as lawful." The court did not say: "When we judge the saloon by its natural results, as we judge the 'bucket-shop' we find it to be lawful." The court could not pursue this method of reasoning and reach such a conclusion. It could and did assert the proposition, but it could not and did not support it by conceded facts. This declaration was made on the 28th day of May, 1907.

If the court had employed its own estimate of the saloon, in Scmidt vs. Indianapolis, 80 N. E. 632, announced by Judge Montgomery, on March 21, 1907 as follows: "The evils which attend and inhere in the business of handling and selling intoxicating liquors are universally recognized and the danger therefrom to the peace and good order of the community everywhere necessitates the exercise of the police power. This necessity for regulation and restriction in the interests of peace and good order and for the promotion of public morals, as already said, distinguishes the liquor business from useful and harmless occupations," it certainly could not reach the conclusion that, in the absence of legislation, it is universally lawful. To do so, would assert that a useless occupation and one so harmful, that evil and danger to the peace and good order of the community attend and inhere in it, is lawful. This conclusion can only be reached by disregarding universally recognized facts and ignoring the established, common sense principles of the law. A given proposition of law ought to be given the same application to all acts and pursuits of like inherent character and that produce like results.

It accords with the common observation and experience of men, that the saloon is one of the most productive causes of the "bucket-shop" itself. Not many "bucket-shop" gamblers can be found who were not first saloon habitues. "Bucket-shop" gambling, being one of the natural results of the saloon, its natural effects are among the inherent results of the saloon, and, if, in the absence of legislation, the law condemns "bucket-shop" gambling, it

must, under the same conditions, likewise condemn the saloon. It can only fail to do so by the refusal of courts to make the same application of legal principles, and, at the oral argument of the Sopher case, the court clearly indicated that it would not measure the saloon by the same standard that it measures other injurious acts and pursuits.

The saloon was "railroading" itself to judicial approval without regard to undisputed facts or established principles of law. It was traveling upon the highway of the blind precedents of ages, without regard to truth, justice or sense.

CHAPTER XXII

THE SUPREME COURT'S OPINION IN THE SOPHER CASE

As disclosed in the last preceding chapter, the Sopher case was founded upon the single contention that the beverage retail liquor saloon is within itself a public nuisance. While there are many statements of fact and some propositions of law, announced in the opinion of the court, to which no just exception can be taken, there are also a number of propositions in this opinion, through which, in the language of Judge Roby, "the red line of reason may be run," in order to ascertain whether they are well founded, or otherwise.

There is a maxim of the law that declares that "where the reason fails, the rule fails." The meaning of the statement is, that, unless there be a reason, there can be no rule. When we attempt to analyze a few of the statements in this opinion, we are doing no more than did Lincoln in his assault upon the Dred Scott decision. There is no statute in Indiana declaring, in so many words, that the beverage retail liquor saloon is a public nuisance. There is and has been for sixty-five years a statute in these words: "Every person who shall erect, or continue and maintain any public nuisance, to the injury of any part of the citizens of this state, shall, on conviction, be fined not exceeding one hundred dollars."

This statute merely declares it to be a criminal offense "to keep or continue and maintain a public

nuisance, to the injury of any part of the citizens of the state." It is, at once, apparent that this statute wholly fails to define, in any way, or specify what particular act or acts or things shall constitute a public nuisance. This statute provides for the penalty, nothing more, and nothing less. Under such a state of facts, where the legislature has failed to name the particular act or thing constituting the offense, it is the settled doctrine of the law, that we must look to the rules and principles of the common law to ascertain whether the act charged constitutes a public nuisance.

In State vs. Berdetta, 73 Ind. 185, the court declares the rule as follows: "Counsel for appellee argue with much force and ingenuity that the common law doctrine does not prevail in Indiana, for the reason that our statute prescribes an essentially different rule. It is indeed true, as counsel assert, that we have no common law offenses, and that criminal prosecutions can only be maintained, for such offenses, as are prescribed by statute. It does not, however, follow from this that there is no such thing as an indictable public nuisance under our statute. In Burk vs. The State, 27 Ind. 430, it is held that there is such an offense, although the statute does not specifically define a public nuisance. In that case it was held that "The phrase 'public nuisance' had a very definite meaning in the law long before the statute was enacted." If the case cited should be followed to its logical consequences, it would require us to hold that what was at common law a public nuisance is such under our statute, and that permanently obstructing a highway is *per se*

a public nuisance, because it was always such at common law. We hold this to be the correct ruling."

So that, the contention in the Sopher case resolves itself into this: Is the beverage retail liquor saloon a public nuisance at common law? If it is a public nuisance at common law, then, the keeper is subject to the penalty of the statute.

The statute is not required to make the act or acts unlawful, but merely to provide a penalty for an act or acts already unlawful at common law. No matter how gravely unlawful an act may be at common law, there can be no criminal punishment inflicted for it, unless there be a statute fixing the penalty. In the case of a public nuisance, the legislature has, by statute, determined the penalty, but the legislature has not assumed to say what specific acts, in any case, constitute a public nuisance.

Then, we are left to ascertain, if the beverage liquor traffic is a common law public nuisance. Nothing can be a public nuisance unless it be an invasion of the public rights of citizens. Such a nuisance necessarily arises from unlawful acts, for lawful acts are not and can not be an invasion of the fundamental rights of citizens. After having reasoned up to this point, the supreme court dismisses the proposition by asserting that the saloon, unless conducted in a disorderly manner, has always been regarded as lawful at common-law. No definition of a common law nuisance is given by the court. No principle or rule is stated by which we are to determine whether a given act or pursuit is

lawful or unlawful at common law, and, this being true, we must look elsewhere for this principle.

Although the legislature of Indiana has not designated, by name, the specific acts and pursuits that are nuisances, it has declared a standard, by which any act or pursuit, claimed to be a nuisance, is to be weighed. Section 290 of the revised statutes of Indiana for 1881, provides: "Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action." If the saloon comes within the limits of this provision, it is unlawful and a nuisance, and whether it does is to be determined by the reason, observation and experience of men.

The question is not, What has the saloon been held to be? but, what is it in reality? If *truth* were ten thousand times declared to be *false*, it would not be *false*. The error is in the declaration. On this very question, Wood on Nuisances, section 27, says: "The question is not whether an act has been declared to be, but does it come within the idea of a nuisance? If so, it *is* a nuisance, though never before held so; if not, it is not a nuisance, though held so in a thousand instances before." So, unfounded holdings either way should not control as precedents. We are to measure the twentieth century common law or unlicensed saloon, as it is, not as it is not, and we are to measure it by twentieth century ideas of right and wrong, twentieth century standards of the equality of rights.

In State vs. Gerhardt, 145 Ind. 439, the Indiana Supreme Court, speaking by Judge Jordan, the same judge, who wrote the opinion in the Sopher case, gave the following estimate of the unlicensed common law saloon: "The unrestricted traffic in intoxicating liquors, has been found, by sad experience, to be fraught with great evil, and to result in the most demoralizing influence upon private morals, and the peace and safety of the public." Webster defines *fraught* to mean freighted, laden, filled, stored, charged. Then, we are to answer, Is a pursuit, that is freighted, laden, filled, stored and charged with great evil and the most demoralizing influence upon private morals and the peace and safety of the public, injurious to the health, or indecent, or does it essentially interfere with the comfortable enjoyment of life or property?

In the Sopher case the court says: "The statute neither professes to, nor does it, license a business that was wrong or illegitimate at common law. By this statement the court commits itself to the doctrine that the common law regards a pursuit that is fraught, that is, freighted, laden, filled, stored and charged with great evil and the most demoralizing results upon private morals and the safety and peace of the public, as right and legitimate. If so, it would surely be a very difficult task to find any act or pursuit that is wrong and illegitimate at common law.

In this connection, the language of the Supreme Court of Illinois, in Goddard vs. President, 15 Ill. 589, is very pertinent. That court, dealing with the liquor question, said: "Their sale for use as a com-

mon beverage and tippling is hurtful and injurious to the public morals, good order and well-being of society." We should not overlook the import of this statement. "The court affirms that the *beverage sale* of liquors is hurtful and injurious to the public morals, good order, and well-being of society," but the Illinois court does not view the sale as right and legitimate at common law. It says: "When we defend the sale of liquors for the purpose of tippling we surely draw our arguments from our appetites, and not our reason, observation and experience." This statement, made by the writer, would be hailed as the frothing of a maniac, but it is the solemn statement of a supreme court. Applying this statement to the conclusion of the Supreme Court of Indiana that the saloon, in the absence of legislation, is neither wrong nor illegitimate, but is right and legitimate, the Supreme Court of Illinois would say that the Supreme Court of Indiana drew its conclusion from its appetite, and not from its reason, observation and experience.

And again the Illinois court, speaking by the judge writing the opinion, said: "Viewing the great and irreparable mischief growing out of this practice, I am not prepared to say, but, that another nuisance may be added to the list."

The views of these two supreme courts, as to the beverage sale of intoxicating liquor, are radically different and widely divergent.

Not only that, but the Indiana Supreme Court is at as much variance with itself in its estimates of common law rights and wrongs. It has repeatedly held that "bucket-shop" gambling is unlawful, in

the absence of any statute. It has said, over and over again: "The bucket-shop is in contravention of the common law, is hostile to public policy, and is, therefore, both illegal and immoral."

The court certainly could not reach this conclusion except by reasoning from some well established or generally known proposition of fact. Whether any act or pursuit is lawful or unlawful at common law must be determined from its inherent character and its effect upon society, for it can not be that some power some time in the remote past classified all things either as *lawful* or *unlawful* at common law, and that, by the accident of classification, the saloon was assigned to the lawful class and the "bucket-shop," to the unlawful.

In Pearce vs. Dill, 149 Ind. 136, in an opinion written by Judge Jordan, the Indiana Supreme Court placed its estimate upon the "bucket-shop" in this language: "The business or operations of the 'bucket-shop,' have been the source of much evil. Embezzlements and other crimes on the part of public officers, and bank officials, having the custody of money belonging to others, have been in the past some of the evil fruits directly traceable to dealing in futures in these institutions; and the question of prohibiting such transactions or business, as it is generally conducted, merits the consideration of the legislature."

The court, in this case, held the "bucket-shop" to be unlawful at common law, that is, unlawful, in the absence of a statute so declaring. It surely did so because of the estimate that is placed upon the practice. The court declared it to be, in its opinion,

the source of much evil, and of embezzlements and other crimes. Hence, if the court has a uniform standard of legal measurement, anything, no matter what may be its name, that is the source of much evil and of embezzlements and other crimes is unlawful at common law.

The Indiana Supreme Court, in estimating the saloon, has said: "It is a useless and harmful occupation; evil and danger to the peace and good order of society attend and inhere in it; it is dangerous to public and private morals; it is the acknowledged source of three-fourths of all the crimes committed." If the standard invoked in the "bucket-shop" case be applied to the court's own estimate of the saloon, there is no possible escape from the conclusion that the saloon is unlawful at common law. The escape is made by applying a different standard, or rather by a refusal to apply any standard at all, and the excuse is made that, as to the saloon, the matter is wholly a legislative question.

The saloon and the "bucket-shop," when measured by their injurious results, belong in the same class, except that the saloon is many times the more dangerous. The courts declare the less dangerous of the two wrong and unlawful, and the more dangerous, which is one of the chief producers of the other, to be right and legitimate. Then, there is one law for the "bucket-shop" and a different law for the "saloon." There is not and can not be such a difference in reality, but there can be and there is this difference in the application of the same law by the same court. The infirmity is in the court, not in the law.

In discussing the Southern problem, Ingersoll made use of the following language: "I believe in passing the same laws for the South as we do for the North. The law that is good for the North is good for the South, no matter how hot it is. A law that is good for the South is good for the North; climate has no influence upon justice. The mercury can not rise high enough to make wrong right. If climate affected law, we ought to have two sets of law in this country, one for the winter and one for the summer."

His language is very applicable to the saloon situation. Judicial distinctions and discriminations can never be so refined, as to accept as correct the estimate of the Indiana Supreme Court of the "bucket-shop" and the saloon, and then, upon the basis of common sense, classify the "bucket-shop" as wrong and unlawful and the saloon as right and lawful.

The political power and influence of the liquor traffic can never be so potent as to make wrong right, falsehood truth or injustice just. It can and often does control, distort and pervert the enactment, the interpretation and the execution of the law, but the law remains the same. The distortion and perversion take place in the officers, not in the law. It is no argument to say that courts have regarded the saloon as lawful.

Slavery was so regarded for two hundred and forty years; so was dueling for centuries, and prostitution was protected in England as an honorable avocation until the reign of Henry VIII, but no decent court would so regard them now, and yet,

the evil effects of all three combined are insignificant when compared with the misery, the anguish and the woe entailed upon the human family by the saloon alone.

THE QUESTION CONSIDERED FROM THE VIEW POINT OF PRECEDENTS

Turning from the statements of the Indiana Supreme Court, we wish to consider the evidence that may be introduced against the saloon upon the charge of being a nuisance solely from the realm of precedent.

What is our definition of a nuisance? We shall not venture an original definition. Wood on Nuisances, section 24, says: "The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promotion of evil manners, and anything that produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance."

This author names three elements, which, if they be the natural results of an occupation, condemn it as a public nuisance.

a. Tampering with the public morals.
b. Tendency to idleness.
c. Promotion of evil manners.

It would not be profitable to occupy the space requisite to an expression of the personal views of the writer, as they relate to the saloon in these respects. The opinions of supreme courts constitute the only evidence that we shall offer.

Pearson vs. International Distillery, 72 Iowa 348. —The evils flowing from the saloon are too numerous to mention all of them, but among them are idleness, poverty, pauperism, crime, insanity, disease, the destruction of human life, broken homes and orphanages.

State vs. Durien, 80 Pac. 987.—Saloons are a contagious peril to the peace and good order of society. They are a prolific source of pauperism, disease, vice, crime and public expense. They weaken, corrupt, debauch and slay human character and human life.

State vs. City Council, 42 S. C. 222.—There is no more potent factor in keeping up the necessity for asylums, penitentiaries and jails, and in producing pauperism and immorality, than saloons.

Goddard vs. President, 15 Ill. 589.—The saloon is a vendor of a slow and sure poison that destroys ten times as many human lives as all other evils together.

Our House No. 2 vs. State, 4 Freem (Iowa) 172. —Saloons lead to the ruin of property, character and health, and are proved to be the leading incentives to crime.

State vs. Crawford, 42 Am. Rep. 186.—No greater source of crime and sorrow ever existed than social drinking saloons.

Whitney vs. Township Board, 39 N. W. 40.— By the common consent of both the law and public conviction the saloon is attended with danger and peril to the lives, health and happiness of the people; it is both mercenary and merciless.

Scwuchow vs. Chicago, 68 Ill. 444.—Saloons demoralize the community, foster vice, produce crime and beggary, want and misery.

Thurlow vs. Commonwealth, 5 Howard 504.—The appalling statistics of misery, pauperism and crime are the result of the saloon.

Crowley vs. Christenson, 137 U. S. 86.—Statistics show a greater amount of crime and misery arising from the saloon in each of the states than from any other source.

Santo vs. State, 2 Iowa, 164.—The weight of woe created by lotteries, gambling, debauchery and obscenity united is very small when compared with that created by the saloon alone.

Accepting these opinions of the saloon as well founded in fact, and they certainly accord with the universal observation and experience of men, there is not a single element of either a statutory or common law nuisance that is not thoroughly and completely embraced in the saloon.

Assuming that the English Parliament, in the statute of 1552, placed a correct estimate upon the saloon, when in the preamble, it says: "For as much as intolerable hurts and troubles to the commonwealth of this realm doth daily grow and increase through such abuses and disorders as are had and used in common ale houses and other houses called tippling houses," it thereby declared the saloon to be unlawful and a nuisance four hundred and fifty years ago.

Suppose we analyze the statement. The saloon was then the source of intolerable (unbearable) hurts and troubles to the public and these hurts

and troubles grew and increased daily. So, on the second day they would be *more* intolerable and on the third *most* intolerable. There has never been, at any time, in any civilized government, in the world, any principle of the common law that approves and recognizes as lawful either an intolerable, a more intolerable or the most intolerable hurt and trouble to the public. And a declaration to the contrary is a libel upon the common law of the world.

THE SALOON UNLAWFUL UNDER THE COMMON LAW OF BEASTS

In the light of the characterization of the saloon by the English Parliament, the saloon is unlawful, when measured by the common law of wild animals, for the observant man has long ago learned that beasts avoid and condemn those things which naturally tend to destroy the herd or pack.

The common law of beasts stands for the general good of the brute creation. In the words of Kipling:

> "Now this is the law of the jungle,
> As old and as true as the sky.
> And the wolf that shall keep it may prosper,
> But the wolf that shall break it must die.
> As the creeper that girdles the tree trunk,
> The law runneth forward and back;
> For the strength of the pack is the wolf,
> And the strength of the wolf is the pack."

A KENTUCKY DEFINITION OF A NUISANCE

In Ehrlick vs. Commonwealth, 102, S. W. 289, the Court of Appeals of Kentucky, on May 21, 1907, said: "A nuisance per se is any act, or omis-

sion, or use of property or thing which is of itself hurtful to the health, tranquillity or morals, or outrages the decency of the community. It is not permissible or excusable under any circumstances."

If the Indiana Supreme Court were to follow this definition, in the light of its own estimate of the saloon, it could not avoid declaring the saloon a nuisance. In as much as it refuses to reach this conclusion, it necessarily follows that the Indiana court would modify the Kentucky definition to read as follows: "A nuisance per se is any act, or omission, or use of property or thing, the saloon excepted, which is of itself hurtful to the health, tranquillity or morals, or outrages the decency of the community."

The only way to avoid declaring the saloon a nuisance is to purposely and intentionally refuse to apply the law.

A NUISANCE CAN NOT BE LEGALIZED

There is no constitutional authority to license a nuisance. It is one of the maxims of the English common-law, "that the king can not license the erection, maintenance or continuance of a nuisance." This doctrine has often been applied in the United States to permanent obstructions of public highways under the authority of municipal licenses, and the holdings have universally been that such an obstruction is, within itself a nuisance and that unobstructed public highways is one of the inherent, inalienable rights of citizens, which can not be forfeited by a license. Civil government is founded upon the assumption that, at the creation, Almighty

God endowed all men with the inherent and inalienable right to an unobstructed highway to the enjoyment of life, liberty, property, and the pursuit of happiness, and it is the mission of government to secure this highway and keep it clear of obstructions. Lest legislative bodies might fail to observe this obligation, the people, in the fourteenth amendment, have expressly forbidden any obstruction to the equal enjoyment of these fundamental rights. No more effective barrier to the security of these rights, in the experience of man, than the saloon has ever been discovered.

Such a hindrance is naturally, in the absence of any statute, unlawful as contrary to the object of government, and surely no agency of government can lawfully permit, by means of a license, that which is within itself a menace to the governmental purpose.

A HUMOROUS PROPOSITION

Speaking of the act of the English Parliament of 1552, declaring unlicensed tippling houses to be unlawful, the court, in the Sopher case, says: "In passing, it may be said that, if tippling houses, wherein intoxicating liquors were sold to various persons to be drank as a beverage, were already unlawful under the common law, it would seem strange, under the circumstances, that the English Parliament should have interposed and enacted a statute making such houses unlawful."

And again, discussing the act of the Indiana legislature of 1875, declaring unlicensed saloons to be unlawful, the court says: "It may be said that

it seems singular that the Legislature, in enacting the statute, should deem it necessary to declare that to be unlawful which, as counsel for the state contend, was already unlawful at common law." The court has discovered that it is strange and singular to declare, by statute, a thing to be unlawful, when it is already unlawful at common law, and the judges are convulsed in fits of ectasy over their new find. The serious earnestness with which the court advances this argument is actually amusing. The court is apparently impressed with the idea that such a state of facts will be an unusual condition in legal literature.

The truth of the matter is that a very large per cent. of the acts declared to be unlawful in the criminal statutes were unlawful prior to the enactment of such statutes, and the statutes would be sufficient, if they merely prescribed a penalty for the acts without declaring them to be unlawful.

This very court has at least a dozen times declared that "bucket-shop" gambling is unlawful at common law, and the court would surely, in view of its expression in the Sopher case, now regard it is as strange and singular if the legislature should declare "bucket-shop" gambling to be unlawful.

In Pearce vs. Dill, 149 Ind. 136, in an opinion written by Judge Jordan, the court suggested that the legislature should enact a statute "prohibiting bucket-shop" gambling, and in Western Union Telegraph Co. vs. State, 165 Ind. 492, in an opinion, written by Judge Montgomery, the court advised that the "bucket-shop" should be "outlawed by statute." This is peculiar advice from a court that

regards it strange and singular to declare, by statute, a thing to be unlawful, when it is already unlawful at common law.

In 1907, the general assembly, heeded this strange and singular advice of the court and enacted a statute, which reads: "It shall be unlawful for any corporation, copartnership or person to keep or cause to be kept, within this state, any bucket-shop, etc."

DECLARATORY STATUTES

A statute, declaring unlawful that which is already unlawful, is merely declaratory of the common law.

In the Sopher case, the Indiana Supreme Court declares such a statute to be strange and singular. The indications are that the judges of this bench never read or heard of such a statute. Among the very rudimentary lessons that a law student usually receives is the definition of a declaratory statute. Discussing the subject, Blackstone says:

"Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural *duties* receive any stronger sanction from being also declared to be duties by the law of the

land. The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled *mala in se*, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For the legislature, in all these cases acts only, as was before observed, in subordination to the great Lawgiver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.

But with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life."

Murder, theft, perjury and other like offenses require no statute to make the act unlawful. They are unlawful, if never mentioned by the legislature, but no punishment can be inflicted unless the legislature fix it by statute. Conservative and reliable statisticians claim that eighty per cent. of all the murders committed in the United States can be traced to the saloon as the direct cause.

There are from ten to twelve thousand murders in the United States each year, and each one of them is unlawful in the absence of a statute. The saloon is the direct cause of from eight to nine thousand of these murders annually, and yet, courts put themselves in the attitude of affirming that the

result (murder) is within itself unlawful and that the cause (the saloon) is within itself right and legitimate. If principles of law have a foundation in fact, it must certainly be that any act or pursuit must be judged by its natural results and that its legal status must be determined by its results. If so, the saloon is certainly unlawful in and of itself.

IS THE LICENSED SALOON HARMLESS

In the Sopher opinion, the court announces the following profound and original proposition: "Counsel, however, appear to be unmindful of the fact that it is the unrestricted and unregulated traffic in such liquors which the courts have regarded as tending to pernicious or evil results."

We should not overlook the fact that it is the unrestricted and unregulated traffic, that is, the unlicensed saloon, as it existed previous to legislation, that the court, in the Sopher opinion declares to be right and legitimate at common law.

In other words, the court puts itself in the attitude of asserting that pernicious and evil results, flowing from a saloon are not wrong and unlawful, unless a legislature so declares.

The court, by saying that it was the unlicensed traffic that the courts regard as tending to pernicous and evil results, doubtless intended to convey the idea that the licensed traffic is harmless. No more unfounded proposition was ever advanced by a sensible man. If the licensed saloon is harmless and free from pernicious and evil results to society, the saloon problem could at once be solved by

granting free licenses to everybody to conduct saloons. The position would lead to the affirmation that, if two saloons front on the same street, with only a wall between them, one licensed and the other unlicensed, the licensed saloon will be harmless and the unlicensed saloon will tend to pernicious and evil results.

Such a conclusion does not accord with the common observation and experience of men. The truth of the matter is that the horrible cutting, stabbing and shooting assaults and murders that occur in saloons most generally take place in the licensed saloon, where men congregate and remain, without any attempt at seclusion, because the dive is operated under legislative sanction and protection. The truth on this question was never more clearly and eloquently expressed than by United States Senator John J. Ingalls, of Kansas, when he said: "Observation of the results of license, both in this country and in Great Britian, leads irresistibly to the conclusion that it is not successful as a means of overcoming the evils of intemperance. Nothing can be said in favor of the saloon, whether licensed or unlicensed. To raise a revenue by authorizing the sale of that which debases and pauperizes the people is both unprofitable and immoral, and therefore indefensible."

LEGISLATIVE CONSTRUCTION

After affirming that the legislative interpretation and construction of the constitution for fifty years should have persuasive influence with a court in determining the constitutional status of the saloon,

the court becomes facetious and says in a vein of sarcasm and ridicule: "If it could be said that the Legislature, under our Constitution, in dealing with the traffic, must be confined to the passage of a prohibitory measure, then the eminent men who formulated our fundamental law, members of the Legislature and courts, have been for many years quite ignorant or uninformed in respect to the power of the Legislature in dealing with the question. Especially may this be said in regard to the Legislature of 1881, which passed a resolution proposing to ingraft a prohibitory amendment upon our present Constitution."

In regard to this statement, unjudicial in tone and spirit, it may be said that there has not been uniformity either of legislative or judicial declaration in regard to the saloon in Indiana for fifty years. And, in view of past declarations by the court as to the weight and effect of legislative construction, its present manifestation of respect for it is most remarkable.

In Guckien vs. Rothrock, 137 Ind. 355, answering the contention of counsel that a certain statute had been construed by the legislature, the court said: "That was nothing more than the opinion of the legislature as to the proper construction of an act of a previous legislature. That opinion, however, can have no binding force on any one, because the legislature can exercise no judicial power." Upon the question of legislative construction the Supreme Court, in the case of the State vs. Boice, 140th Ind. at p. 511 said: "If the legislative construction of the law and the constitution were conclusive, this

case would have no place in the courts, and judicial inquiry and interpretation would be denied. This conclusion, however, is at such variance from the well established rule which confines questions of interpretation to courts, where legislative discretion is not involved, that we pass the suggestion without further consideration."

In Rice vs. State, 7 Ind. 334, the court said:

"It may be mentioned as a fact, also that the judges of the Courts are sworn to support the constitution, but are not, at least expressly, sworn to support the legislative acts of the state."

"It follows, of consequence, from the foregoing propositions, that the Courts, in ascertaining what the law of a case is, whether the statute or the constitution, or both, where the two are involved, must determine the meaning both of the statute and the constitution, and the capability of the two to stand together.

"The duty of the Courts to give construction to laws, and to declare void, or disregard because not laws, those legislative acts in conflict with the constitution, grows, of necessity, out of this other duty of declaring what the law is.

"The right and the duty of the Courts, therefore, to compare legislative acts with the paramount law, and to bring them to its test, are not of the seeking of the Courts, but are forced upon them, in every case where the two may have application.

"If the constitution ordains that property and liberty shall be safe; that the press shall be free; that religious liberty shall be preserved; and the legislature enacts laws touching these subjects, the

Courts can not escape the office, delicate and unwelcome to be performed as it may be, of deciding whether those laws are consistent with the constitution or not."

In order to properly determine the motive of the general assembly of 1881, in adopting the resolution for a prohibitory constitutional amendment, we may very profitably look into a few antecedent facts.

In 1853, the general assembly enacted a local option provision, in the liquor license statute of that year, and the Supreme Court very promptly held the local option provision to be unconstitutional and void. Maize vs. State, 4 Ind. 342.

In 1855, the legislature enacted an absolute prohibitory statute against the beverage saloon.

The Supreme Court declared the statute to be unconstitutional upon the ground that it was an invasion of the absolute, inherent and inalienable rights of citizens.

Bebee vs. State, 6 Ind. 501.

Herman vs. State, 8 Ind. 545.

O'Daily vs. State, 9 Ind. 494.

So that, the efforts of legislatures to establish both local option and absolute prohibition, were thwarted by decisions of the Supreme Court.

Even, upon the basis of the contention that the saloon can not be legally licensed, under the constitution, the legislature of 1881, in the adoption of the resolution proposing to engraft a prohibitory amendment upon the constitution, instead of meriting the suggested criticism that it was "ignorant and uninformed," is entitled to the compliment of

knowing how to evade foolish and unfounded court decisions.

Legislatures have often enacted statutes for the very purpose of relieving the people from the folly of the Supreme Court, and such was their motive in proposing the prohibitory amendment of 1881. Speaking of legislation for the correction of judicial errors, Judge Roby, of the Indiana Appellate Court, says: "After a decision is rendered, it is prima facie a rule of law. It has to be applied in practice. Practice reveals its error, or the growth of a community may reveal that the rule trammels business. When this happens, as it often does, it ought not to be necessary to seek legislative aid. How difficult it is for courts to correct their own errors can be proven by a reference to the many decisions in Indiana holding bills of exceptions, containing evidence, "not before the court" although in every case a written report, the truthfulness of which was unquestioned, lay upon the judge's desk. The Legislature has obliterated decision after decision and rule after rule, but if the courts escaped from one of them without legislative aid I do not know what one it was."

The opinion of the Supreme Court of Indiana, in Bebee vs. State, holding the prohibitory statute of 1855, to be unconstitutional has been repudiated and criticised by the United States Supreme Court and by many state supreme courts. And, while the Supreme Court of Indiana has never since decided the question of the validity of a prohibitory statute, it has repeatedly said, in deciding other questions, that a prohibitory statute would be valid.

Freund, in Police Power, affirms that the decision in the Bebee case is the only opinion of the kind ever announced by a supreme court in the United States.

An unbiased and unprejudiced mind, in the face of the record, is justified in accepting seriously the facetious remark of the court, as applied to itself, and is warranted in concluding that the court, at least a part of the time, has been "ignorant and uninformed as to the power of the legislature in dealing with the question."

In declaring the prohibitory act of 1855 unconstitutional, the court advanced some positions that are now universally repudiated and regarded as unfounded, yet, they have as much of a foundation, in fact, and the conclusion is a more logical deduction from the assumed facts than is the decision of the Sopher case.

In the Bebee case, the court said:

"We assume it as established, then, that the liquor act in question is absolutely prohibitory of the manufacture, sale and use, as a beverage, by the people of this state, of whisky, ale, porter and beer.

"And we may as well remark here as anywhere, that if the manufacture and sale of these articles are proper to be carried on in the state for any purpose, it is not competent for the government to take the business from the people and monopolize it. The government can not turn druggist and become the sole dealer in medicines in the state; and why? Because the business was, at and before the organization of the government, and is properly

at all times, a private pursuit of the people, as much so as the manufacture and sale of brooms, tobacco, clothes, and the dealing in tea, coffee and rice, and the raising of potatoes; and the government was organized to protect the people in such pursuits from the depredations of powerful and lawless individuals, the barons of the Middle Ages, whom they were too weak to resist, single-handed by force; and is inconsistent with the right of private property in, and pursuits by, the citizens. 'A government is guilty of an invasion upon the faculties of industry possessed by individuals, when it appropriates to itself a particular branch of industry, the business of exchange and brokerage for example; or when it sells the exclusive privilege of conducting it.'

"We have said that we should treat the question of the right of the Court to judge of the grounds of a law alleged to infringe constitutional restrictions, as one of authority. We will however add the remark, that the Court knows, as matter of general knowledge, and is capable of judicially asserting the fact, that the use of beer, etc., as a beverage, is not necessarily hurtful, any more than the use, of lemonade or ice-cream. It is the abuse, and not the use, of all these beverages that is hurtful. But the legislature enacted the law in question upon the assumption that the manufacture and sale of beer, etc., were necessarily destructive to the community; and in acting upon that assumption, in our own judgment, has unwarrantably invaded the right to private property, and its use as a beverage and article of traffic."

In the Herman case, the court said: "We have thus shown, from what we will take notice of historically, that the use of liquors, as a beverage, and article of trade and commerce, is so universal that they cannot be pronounced a nuisance. The world does not so regard them, and will not till the Bible is discarded, and an overwhelming change in public sentiment, if not in man's nature, wrought. And who, as we have asked before, is to force the people to discontinue the use of beverages?

"Counsel say the maxim that you shall so use your own as not to injure another, justifies such a law by the legislature. But the maxim is misapplied; for it contemplates the free use, by the owner, of his property, but with such care as not to trespass upon his neighbor; while this prohibitory law forbids the owner to use his own in any manner, as a beverage. It is based on the principle that a man shall not use at all for enjoyment what his neighbor may abuse, a doctrine that would, enforced by law in general practice, annihilate society, make eunuchs of all men, or drive them into the cells of the monks, and bring the human race to an end, or continue it under the direction of licensed county agents.

"Such, however, is not the principle upon which the Almighty governs the world. He made man a free agent, and to give him opportunity to exercise his will, to be virtuous or vicious as he should choose, he placed evil as well as good before him, he put the apple into the garden of *Eden,* and left upon man the responsibility of his choice, made it a moral question, and left it so. He enacted as to

that, a moral, not a physical prohibition. He could have easily enacted a physical prohibitory law by declaring the fatal apple a nuisance and removing it. He did not. His purpose was otherwise, and he has since declared that the tares and wheat shall grow together to the end of the world. Man cannot, by prohibitory law, be robbed of his free agency."

The conclusion of the court is based upon the false assumption that intoxicating liquor is not of itself harmful and injurious and that the saloon is one of the ordinary, useful avocations of life, and that, therefore, its absolute prohibition is an unlawful invasion of the inherent, inalienable rights of citizens, as much so as would be the absolute prohibition of farming or the grocery business.

In 1855, the court regarded the saloon as inherently innocent and as one of the useful occupations, and, from this estimate, concluded that it could not be absolutely prohibited. The error was in the estimate placed upon the saloon. If the estimate had been true to the facts, the conclusion drawn would have been the legitimate result.

In 1907, the court affirms that danger to public and private morals and to the safety and peace of society attend and inhere in the saloon, a correct estimate, and then concludes that it has the same legal basis as the useful and harmless occupations of life, and is, therefore, right and legitimate, a conclusion fully as erroneous and unfounded as the estimate of 1855.

Josh Billings once said: "There are some facts that are not facts, because they are not true."

In 1855, the court determined the status of the saloon upon facts, which were not facts, because they were not true.

In O'Hooligan's Fine Forms, page 53, Mr. Justice O'Hooligan says: "There is a great difference between the rules of the common law, which do exist, and those which do not."

In 1907, the Supreme Court of Indiana determined the status of the saloon by those rules of the common law which do not and never did exist.

The foundation of the conclusion of 1855 is no more destitute of reason than that of 1907.

CHAPTER XXIII

THE CONFLICT IS A WAR—NOT A BATTLE

No legal question, involving a proposition of fundamental power, is ever settled until correctly decided.

For over two hundred and forty years human slavery was tolerated on American soil, and was regarded as lawful for seventy-five years after George Washington was inaugurated as the first President of the United States. It was, indirectly, at least, recognized in the federal constitution, in the clause in reference to the apportionment of representatives and direct taxes; it was directly and expressly sanctioned by numerous congressional enactments; it was approved in many state constitutions; it was frequently endorsed by Acts of state legislatures; it was often adjudged to be lawful by inferior courts, both federal and state, by state supreme courts, and most emphatically so by the Supreme Court of the United States; but all of these combined could not and did not settle the question. It involved a question of fundamental governmental power, and it could not be settled until it was rightly determined.

Questions of fundamental governmental power are bottomed and based upon the principles of the moral law, the eternal and unchangeable principles of right and wrong, and the enlightened human conscience, is the supreme judge of such questions. An honest conscience, in harmony with the law of its Eternal Maker, never approves a moral wrong.

So, while the national congress, state legislatures and courts of high and low degree declared human slavery to be lawful, they utterly failed to settle the question on that theory. Such declarations were impotent to appease the righteous conscience of the liberty-loving and God-fearing people of a government, whose prenatal foundation is the equality of the rights of all men.

In its efforts to quiet the storm of opposition and protest against the blighting curse, congress, under the guiding and controlling hand of Henry Clay, was kept so busy framing and adopting compromises, that the great commoner of Kentucky is known in history as the "Compromiser" or "Peace Maker," but none of his compromises were effective, and all of his efforts to still the turbulent sentiments of opposition were futile. Each effort added fuel to the flames and kindled afresh the determination of the disciples of 1776 to secure a just recognition of the assumed principles of the Declaration of Independence and of the constitution.

They were guided by the spirit of the proverbial statement of Abraham Lincoln, that, "The government can not permanently endure half slave and half free." And, never until it was decreed that this is wholly a free-man's government, was the slavery question settled. It was settled then, because it was rightly determined—adjudged in conformity with the doctrine that all men are endowed by the Creator with equal rights. Infamous and odious, as was human slavery, yet, it was as harmless as a pet lamb, as innocent as a new-born babe, when compared with the red saloon dragon,

which stalks boldly, arrogantly, defiantly and insolently throughout the land, entrenched behind and protected by, not the law, but legislative enactments in the guise and garb of the law.

Courts may adjudge, judges decide, lawyers assert and newspapers affirm that such enactments are the law, but, all of them united, will never settle the question that way, but they will deepen and intensify the opposition to the iniquitous curse until it shall be swept from the face of the earth, and then the saloon question will be settled, because it will be rightly decided. The government can no more permanently endure half drunk and half sober, half "wet" and half "dry," half license and half anti-license, than it could "half slave and half free."

But the conflict can not be won in a single engagement; it is not a battle, but a protracted, bitter war. The anti-slavery heroes were frequently repulsed both before and during the test of arms from '61 to '65. If a single engagement were to have determined the fortunes of war, Bull Run would have closed the incident, but,

God moves in a mysterious way
  His wonders to perform;
He plants his footsteps in the sea,
  And rides upon the storm.

Deep in unfathomable mines
  Of never-failing skill,
He treasures up His bright designs,
  And works His sovereign will.

Bull Run was the event of supreme inspiration to the Union forces; it was the event that aroused

the Herculean strength of the champions of the gospel of equal rights for all men. The Dred Scott decision and the battle of Bull Run could not and did not change wrong to right.

The anti-saloon forces have had their Bull Run and their Dred Scott decision, but they have not changed falsehood into truth nor wrong into right.

We have passed the Gettysburg of the conflict, and the open defenders of the saloon are becoming as scarce as the open defenders of slavery.

The brewers, the distillers and the saloon keepers are all apologizing; they are confessing that conditions are deplorable; they are promising to reform; but they never thought to repent until the rising tide of an indignant public sentiment has ominously threatened the annihilation of the whole business. Even, under such conditions, their greed obscures their vision, and each seeks to shift the blame to the other.

An Indianapolis brewer recently attempted to plead guilty for the distiller. He said that "beer is really a temperance drink. It is cooling, and is beneficial as a food. It is whisky that makes the drunkards and the wrecks; that creates the disease known as *appetite;* that fires the passions, frenzies the brain and causes the nameless crimes and wrongs that are charged, without a just discernment, against the traffic as a whole, when they should be charged to the whisky saloon alone."

In reply to this, and, in defense of his branch of the trade, a Louisville distiller entered the following plea of guilty for the brewer: "Every one bears testimony that no man can drink beer safely; that it is

an injury to anyone who uses it in any quantity, and that its effect on the general health is far worse than that of whisky, clogging his liver, rotting his kidneys, decaying his heart and arteries, stupefying and starving his brain, choking his lungs and bronchia, loading his body with dropsied fluids and unwholesome fat, fastening upon him rheumatism, erysipelas, and all manner of painful and disgusting diseases, and finally dragging him to his grave when other men are in their prime of mental and bodily vigor."

While the traffic, as a whole, concedes that it is indefensible, and each branch of it seeks to shift the responsibility to the other, the saloon has one steadfast, conspicuous, but not consistent, defender, the Indiana Supreme Court.

In 1855, the court said that it knew, as a matter of general knowledge, and was capable of judicially asserting the fact, that the use of beer and other intoxicating liquors, as a beverage, is not necessarily hurtful, any more than the use of lemonade or ice-cream; that such intoxicating beverages were created by the Almighty to promote the social hilarity and enjoyment of men.

At that time, in the exercise of its general knowledge and judicial capability, the court declared that God was the original first brewer and distiller, and that he created the business to promote the social hilarity and enjoyment of the human race; that the inalienable rights of liberty and the pursuit of happiness, secured by the constitution, include the right to use intoxicating liquor as much as they include the right to wear clothes, to select the

articles of ordinary food or to determine their hours of sleeping and waking; that, if the government can prohibit the use of intoxicating beverages, it can also prohibit the drinking of cold water. If any one is the least skeptical as to the court having said these things, he is referred to the 6th Indiana report, pages 519 and 520 and the 8th Indiana report, pages 558 and 564.

In the exercise of its general knowledge and judicial capability, in 1893, the court declared that the saloon is dangerous to public and private morals and dangerous to the public peace and good order of society, but yet, with Damonic faithfulness, it declared that, in spite of these dangers, the saloon has the same legal basis as the drygoods store, the hardware store and the grocery store.

In 1907, the same court, still possessing its general knowledge and judicial capability, declared that evil and danger to the peace and good order of society attend and inhere in the saloon, and that it everywhere tends to pernicious and evil results, but yet, notwithstanding all this, it is still right and legitimate.

In fifty-two years, the temperance army has gained one battle in the Supreme Court of Indiana, the court has changed its estimate of the saloon. If another battle were won, and the court would apply to the saloon, as it now estimates it, the logical legal principle, the conquest would be completely won. To win this battle, there must be a conquest of public sentiment. In this conquest the most helpful ally is an honest faithful public press, and the most deadly enemy is a corrupt, purchasable press.

There has been no more certain progress upon any phase of the saloon problem than in the improved tone of the press. Recently practically all of the Indiana newspapers received from the Anheuser-Busch brewery of St. Louis, a proposition to run a thousand-inch advertisement of Budweiser beer and a defense of the saloon. To the credit of the press of the state, the proposition was almost universally declined. It was published in full by the two leading Indianapolis papers, and this pretty accuratey discloses the state of this battle for the elevation of public sentiment. The country press, as a rule, is on the side of the home as against the saloon, but, with few exceptions, the metropolitan press is as subject to purchase, as the opinion of a medical expert. But, the battle for the application to the saloon, of the principle of law, merited by pursuits of its character, will be won just as certainly as was the engagement that changed it from the cold water catalog to the catalog of contagious perils.

If there were a proposition to foist upon any community a new pursuit, of which it could be clearly demonstrated that it would naturally inflict a tithe of as much misery, anguish, pauperism, moral degredation and crime, upon society, as does the saloon, there is not a respectable court in the land that would not enjoin its establishment on the ground that it is within itself a nuisance. The fact that the saloon is hoary with age, is Sampsonian in political power and has the support of centuries of blind judicial precedents will not forever secure to it judicial protection. An anaesthetized public con-

science is fast wakening from its unnatural slumbers. The time is rapidly approaching, when, in the face of an aroused public sentiment, no court can be found that will have the brazen hardihood to hold that a pursuit, which, like the wolf, crouches by the cradle, waiting for an opportunity to attack the purity of babyhood; a pursuit that necessitates a police force in any community, where it exists, to maintain order; a pursuit that robs homes of their rightful tranquility and makes heart rending partings; a pursuit that is the prolific mother of disease, of gambling dens and of the social evil; a pursuit that makes little, innocent children hungry, cold and sad; a pursuit that seduces the innocence of youth and despoils the purity of woman, that causes murder and all the nameless crimes of depravity, that fills poorhouses, orphanages, insane asylums, jails and penitentiaries, that has caused so much misery, woe and anguish among the people that the heavens are almost draped in mourning, is right and legitimate.

And, then the courts that have placed the institution upon the same legal footing with the cold-water fountain, the lemonade stand, the ice-cream parlor, the drygoods store and the bakery, will be remembered with the same derision as are the courts that have regarded slavery, dueling, gambling and prostitution as right and legitimate.

CHAPTER XXIV

SALOON PROVERBS AND TRUISMS

State Senator Mattingly, the high license champion of Indiana—

"Fully ninety per cent. of all crime can be justly traced to the use of intoxicating liquor."

Father Doyle, of New York—

"Of all the evils that have cursed mankind, crushed woman's heart, sent youth to destruction, driven virtue to the haunts of shame and paved the pathway to hell there is nothing that can compare with the evil of intoxicating drink."

General Booth—

"Nine-tenths of our poverty, squalor, vice and crime spring from this poisonous tap root. Society, by its habits, customs, and laws, has greased the slope down which these poor creatures slide to perdition."

Cardinal Manning—

"For thirty years I have been priest and bishop in London, and now I approach my eightieth year. I have learned some lessons, and the first thing is this: the chief bar to the working of the Holy Spirit of God in the souls of men and women is intoxicating drink. I know no antagonist to that Holy Spirit more direct, more subtle, more stealthy, more ubiquitous than intoxicating drink."

Richard Cobden—

"The temperance cause is the foundation of all social and political reform."

Neal Dow—

"The liquor traffic exists in this country only by the sufferance of the Christian Churches. They are masters of the situation so far as the abolition of the traffic is concerned. When they say 'Go,' and vote 'Go,' it will go. The saloon would destroy the church, if it could; the church could destroy the saloon, if it would."

Henry Ward Beecher—

"Every year I live increases my conviction that the use of intoxicating drinks is a greater destroying force to life and virtue than all other physical evils combined."

Senator Cammack, of Tennessee—

"I am weary of saloon domination. I am weary of the saloon's open alliance with vice, its open contempt of law. I am weary of a condition of things where the man whose business it is to make the laws must hold his office by consent of the man whose business it is to break the laws."

Henry Watterson—

"Every office, from the President's down, is handed out over the saloon counter."

London Times—

"The use of strong drink produces more idleness, crime, disease, want, misery, than all other causes put together."

Bishop Foss—

"As a Christian minister I oppose drink, because it opposes me. The work I try to do, it undoes. It is an obstacle to the spread of the Gospel; nay, it is an enemy which assails the Gospel, and whose

complete success would drive the Gospel from the earth."

Joseph Chamberlain—

"If there is in the whole of this business any single encouraging feature, it is bound to be found in the gathering impatience of the people at the burden which they are bound to bear, and their growing indignation and sense of shame and disgrace which this imposes upon them. The fiery serpent of drink is destroying our people, and now they are awaiting with longing eyes the uplifting of the remedy."

Ex-Governor Larrabee, of Iowa—

"I used to think years ago that so long as I left the saloons alone they would leave me alone. But I was engaged in business for twenty years, during which I permitted several thousand dollars' worth of accounts to accumulate on my books. When I sold out and attempted to collect these, I found they were worthless, and that nine-tenths of my debtors would not have been so had it not been that they had been spending their money for strong drink while I was keeping their families in provisions. It was therefore apparent that, as a matter of fact, I had been the greatest patron of the saloons in our community. I had really contributed more to the saloon-keeper than any other person in town. All of us, no matter how temperate we are, will some day find that we are directly concerned in the saloon traffic."

Col. George W. Bain—

"For every dollar paid the school to cultivate the

intellect of this country, nine dollars are paid the saloon to blight that intellect."

Joshua L. Baily—

"That the revenue of the State may be greatly increased by higher license we do not attempt to deny. But the price would be the sacrifice of honor and virtue, 'the price of blood,' the best blood of the State—the blood of our young men. It would be infamous even should her revenue be increased tenfold thereby. Will anyone say that the crime of Judas would have been less infamous had he received three hundred instead of thirty pieces of silver?"

Samuel Johnson, D. D.—

"To support government by propagating vice, is to support it by a means which destroys the end for which it was originally established, and for which its continuance is to be desired. If the expense of the government cannot be defrayed but by corrupting the morals of the people, I shall without scruple declare that money ought not to be raised, nor the designs of the government supported."

Amos W. Butler, Secretary of the State Charities and Corrections, of Indiana—

"A large majority of the cases of crime in Indiana is traceable to strong drink, and a large part of our idiocy, insanity and pauperism results from the same cause."

Terrence V. Powderly, Grand Master Workman of the Knights of Labor—

"The most damning curse to the laborers is that which gurgles from the neck of the bottle."

R. F. Travelick, President of the National Labor Union and Eight Hour League—

"The use of liquor and its influences have done more to darken labor's homes, dwarf its energies and chain it hand and foot to the wheels of corporate aggression than all other influences combined."

Hon. John D. Long, Ex-Secretary of the Navy—

"The dynamite of modern Civilization."

Archbishop John Ireland—

"The great cause of social crime is drink. The great cause of poverty is drink. When I hear of a family broken up and ask the cause—drink. If I go to the gallows and ask its victim the cause, the answer—drink. Then I ask myself in perfect wonderment, Why do not men put a stop to this thing?"

Charles Buxton, Member of Parliament—

"Drink is the parent of crime. It would not be too much to say that if all drinking of fermented liquors could be done away with crime of every kind would fall to a fourth of its present amount, and the whole tone of moral feeling in the lower orders might be indefinitely raised."

Horace Greeley—

"To sell rum for a livelihood is bad enough, but for a whole community to share the responsibility and guilt of such a traffic seems a worse bargain than that of Eve or Judas."

William McKinley—

"The most degrading and ruinous of all human pursuits."

Archbishop John J. Keane—

"As a man and a Christian, I say, 'Damn the

saloons!' If I could cause the earth to open and swallow up every saloon in the world, I would feel that I was doing humanity a blessing. We must protest against this thing! It has no redeeming feature. It is bad for the home, for humanity, for the Church and for the country. It is a power we cannot wrestle with, for, says the old adage, 'Don't wrestle with a chimney sweep or you will get covered with grime.' The thing we must do is to set our faces against it with the positive determination to conquer it."

Judge Grant, of Michigan—

"The saloon ever has been and ever will be a corrupt element in politics."

Theodore Roosevelt, when Police Commissioner of the City of New York—

"The most powerful saloon keeper controlled the politicians and the police, while the latter in turn terrorized and blackmailed all other saloon keepers. If the American people do not control it, it will control them."

Andrew Carnegie—

"I am not a temperance lecturer in disguise, but a man who knows and tells you what observation has proved to him; and I say to you that you are more likely to fail in your career from acquiring the habit of drinking liquor than from any of the other temptations likely to assail you. You may yield to almost any other temptation and reform, but from the insane thirst for liquor escape is almost impossible. I have known of but few exceptions to this rule."

Lincoln—

"The liquor traffic is a cancer in society, eating out the vitals and threatening destruction, and all attempts to regulate it will not only prove abortive, but will aggravate the evil. There must be no more attempts to regulate the cancer. It must be eradicated, not a root must be left behind; for until this is done all classses must continue in danger of becoming victims of strong drink."

Canon Wilberforce—

"The deriving of vast sums for the revenue from the bitter sufferings and grinding pauperism of the people is a terrible offense. If Judas had received one thousand dollars instead of thirty pieces of silver, would that have justified his conduct."

Lord Chesterfield—

"Luxury, my lords, is to be taxed, but vice prohibited. Let the difficulty in the law be what it may, would you lay a tax upon a breach of the Ten Commandments? Government should not, for revenue, mortgage the morals and health of the people."

Ruskin—

"The encouragement of drunkenness for the sake of the profit on the sale of drink is certainly one of the most criminal methods of assassination for money hitherto adopted by the bravos of any age or country."

William McKinley—

"By legalizing this traffic we agree to share with the liquor-seller the responsibilities and evils of his business. Every man who votes for license becomes of necessity a partner to the liquor traffic and all its consequences."

John Wesley—

"All who sell liquors in the common way, to any that will buy are poisoners-general. They murder His Majesty's subjects by wholesale; neither does their eye pity nor spare. They drive them to hell like sheep. And what is their gain? Is it not the blood of these men? Who, then would envy their large estates and sumptuous palaces? A curse is in the midst of them. The curse of God is in their gardens, their groves—a fire that burns to the nethermost hell. Blood, blood, is there! The foundation, the floors, the walls, the roof, are stained with blood."

Queen of Madagascar—

"I can not consent, as your queen, to take revenue from the sale of liquor, which destroys the souls and bodies of my subjects."

William Lloyd Garrison—

"I will be as harsh as truth, and as uncompromising as justice. On this subject I do not wish to think or speak or write with moderation. No! No! Tell a man whose house is on fire to give a moderate alarm; tell him to moderately rescue his wife from the hands of the ravisher; tell the mother to gradually extricate her babe from the fire into which it has fallen; but urge me not to use moderation in a cause like the present. I am in earnest—I will not equivocate—I will not excuse—I will not retreat a single inch—and I will be heard."

Emperor of China—

"It is true I can not prevent the introduction of the glowing poison. Gain-seeking and corrupt men will, for profit and sensuality, defeat my wishes, but

nothing will induce me to derive a revenue from the misery and vice of my people."

Gladstone's reply to the London brewers—

"Gentlemen: You need not give yourselves any trouble about the revenue. The question of revenue must never stand in the way of needed reforms. But give me a sober population, not wasting their earnings in strong drink, and I shall know where to obtain the revenue."

John Jay—

"To tax a thing, is to tolerate it, and vice, in its nature, is not a thing to be tolerated."

Lief Jones, Member of Parliament—

"I recently met the finished article of the liquor trade. He was lying in the gutter. He had no hat; the hat trade was suffering. His coat was full of holes; the tailoring trade was suffering. He had no shirt; the hosiery trade was suffering. He was dirty; the soap trade was suffering. Indeed, I can hardly mention an industry which was not affected by that man's insobriety."

Judge Butler, of Cairo, Illinois, at the close of a murder trial—

"The case at bar is the seventy-sixth murder case I have tried, either as states attorney or as judge, during the past nineteen years. I have kept a careful record of each case, and I have to say that in seventy-five out of the seventy-six, liquor was the exciting cause."

Sam Jones—

"I've seen a man and a dog go into a saloon and in an hour the man would get beastly drunk and stagger out like a hog, while the dog would come

out and walk away like a gentleman."

Henry W. Grady—

"The saloon is the mortal enemy of peace and order, the despoiler of men and terror of women, the cloud that shadows the face of children, the demon that has dug more graves and sent more souls unshrived to judgment than all the pestilences that have wasted life since God sent the plagues to Egypt, and all the wars since Joshua stood beyond Jerico."

Phillips Brooks—

"If we should sweep intemperance out of our country there would be hardly poverty enough left to give healthy exercise to our charitable impulses."

Sir Andrew Clark, a great London Physician—

"I am speaking solemnly and carefully in the presence of truth, and I tell you I am considerably within the mark when I say to you that going the round of my hospital wards to-day, seven out of every ten owed their ill health to alcohol."

Dr. Edward Everett Hale—

"If anybody will take charge of all Boston's poverty and crime which results from drunkedness, the South Congregational Church, of which I have the honor to be the minister, will alone take charge of all the rest of the poverty which needs relief in the city of Boston."

President Roosevelt—

The friends of the saloon keepers denounce their opponents for not treating the saloon business like any other. The best answer to this is that the business is not like any other business, and that the actions of the saloon keepers themselves conclusively

prove this to be the case. It tends to produce criminality in the population at large and lawbreaking among the saloon keepers themselves. When the liquor men are allowed to do as they wish, they are sure to debauch, not only the body social, but the body politic also."

Carroll D. Wright, United States Commissioner of Labor—

"I have looked into a thousand homes of the working people of Europe; I do not know how many in this country. I have tried to find the best and the worst; and while, as I say, I am aware that the worst exist, and as bad as under any system or as bad as in any age, I have never had to look beyond the inmates to find the cause; and in every case so far as my observation goes, drunkenness was at the bottom of the misery, and not the industrial system or the industrial surrounding of the men and their families."

Wendell Phillips—

"No one supposes that law can make men temperate; but law can shut up these bars and dramshops, which facilitate and feed intemperance, which double our taxes and treble the perils to property and life."

Governor Dawson, of West Virginia—

"The saloon furnishes the scene and the atmosphere where bribery is easy and secure * * * * rallies the venal voters who constitute the bosses' power * * * * is the refuge of criminals * * * * protects vice * * * * affords gamblers a shield and the patronage of inexperienced youth * * * * a place where the opponents

of every movement for civic betterment gather to devise fraud to beat it. To emblazon this responsibility of the saloon is the immediate next task of the saloon's enemies."

The News-Free-Press, LaFayette, Colorado—

"The saloon record comes down to us written in tears and in blood; the age-old story of an institution full of crime and dead to shame.

"A good man or a bad man in such a business has embarked for hell. He will violate the most sacred obligation one man owes to the peace, happiness, the health and the future of another. That business will soon end the career of a bad man, and in the end make a dishonest, skulking, law-breaking liar and thief of a good man. While all this is true the fact remains that such an institution exerts a sort of magical influence over some people. Those who curse it in secret support in the open. Those most grievously plundered and robbed rush to its defense in the day of attack.

"Parents whose hopes have been blasted, whose homes have been impoverished, and whose children have been worse than ruined by the saloon will support it as against all that they hold dear in the day of testing. Almost as much can be said of the strangeness of human conduct in relation to gambling."

Clinton N. Howard—

"Without one dollar of revenue from the saloon Maine has a larger percentage of the total population in the public school than any other state of the New England states, or than New York with its twenty million dollars of revenue from the saloon and more

teachers employed in proportion to her school population than any other state in the Union."

The South Dakota Issue—

"A man first resorts to wine to stimulate his wits; later, he has to resort to his wits to get his wine. When his wits at last forsake him, he cleans out spittoons in the saloon to get his drinks."

Governor Hoch, of Kansas—

"The Devil never invented a bigger lie than that revenue from illegitimate sources is necessary to the financial success of any town or city."

Abraham Lincoln—

"If it is a crime to make a counterfeit dollar, it is ten thousand times a worse crime to make a counterfeit man."

John Ruskin—

"God has lent us the earth for our life; it is a great entail. It belongs as much to them who are to come after us; and whose names are already written in the book of creation, as to us; and we have no right to anything that we do or neglect to do to involve them in unnecessary penalties, or deprive them of benefits which it was in our power to bequeath."

Martin Luther—

" 'Whoever first brewed beer has prepared a pest for Germany. I have prayed to God that he would destroy the whole brewing industry. I have often pronounced a curse on the brewer. All Germany could live on the barley that is spoiled and turned into a curse by the brewer.' "

Robert G. Ingersoll—

"I am aware that there is a prejudice against any

man engaged in the manufacture of alcohol. I believe from the time it issues from the coiled and poisoned worm in the distillery until it enters into the hell of death, dishonor and crime, that it dishonors everybody who touches it—from its source to where it ends. I do not believe anybody can contemplate the subject without becoming prejudiced against the liquor crime. All we have to do, gentlemen, is to think of the wrecks on either side of the stream, of the suicides, of the insanity, of the poverty, of the ignorance, of the destitution, of the little children tugging at the faded and withered breasts, of weeping and despairing wives asking for bread, of the man of genius it has wrecked—the men struggling with imaginary serpents produced by the devilish thing!

"And when you think of the jails, of the almshouses, of the asylums, of the prisons, of the scaffolds upon either bank, I do not wonder that every thoughtful man is prejudiced against the damned stuff called alcohol! Intemperance cuts down youth in its vigor, manhood in its strength, age in its weakness! It breaks the father's heart, it bereaves the doting mother, extinguishes natural affection, erases conjugal love, blots out filial attachments, blights paternal hope, and brings down weary age in sorrow to the grave. It produces weakness, not health; death, not life. It makes wives widows, children orphans, fathers fiends, and all of them paupers and beggars! It feeds rheumatism, nurses gout, welcomes epidemics, invites cholorea, imports pestilences, and embraces consumption! It covers the land with idleness, misery and crime! It fills your

jails, supplies your almshouses and demands your asylums! It crowds your penitentiaries and furnishes victims to your scaffolds! It engenders controversies, fosters quarrels, and cherishes riots! It is the lifeblood of the gambler, the prop of the highwayman, and the support of the midnight incendiary! It countenances the liar, respects the thief, esteems the blasphemer! It violates obligations, reverences fraud, and honors infamy! It deforms benevolence, hates love, scorns virtue and slanders innocence. It incites the father to butcher his helpless offspring, helps the husband to massacre his wife, and the child to grind the patricidal ax.

"It burns up man, consumes woman, desolates and devastates life; curses God, despises heaven! It suborns witnesses, nurses perjury, defies the jury box and stains the judicial ermine! It bribes votes, disqualifies voters, corrupts elections, pollutes our institutions and endangers governments! It degrades the citizen, debases the legislator, dishonors the statesman and disarms the patriot! It brings shame, not honor; terror, not safety; despair, not hope; misery, not happiness; and with the malevolence of a fiend it calmly surveys its frightful desolation and, unsatisfied with havoc, it poisons felicity, kills peace, ruins morals, blights confidence, slays reputation and wipes out national honor; then curses the world and laughs at its ruin. It does all that and more. It murders the soul! It is the sum of all villianies, the father of all crimes, the mother of all abominations, the devil's best friend and man's worst enemy."

Indianapolis News—

"The saloon is a running sore on the body politic. It is a vicious, contagious, dangerous plague spot. There is not room for it and liberty both to live. One or the other must go."

California Voice—

"The maudlin song of a drunken student is no funnier than the contortions of a drowning man. We do not laugh at a fire—why should we laugh at hell-fire in a man?"

Governor Hoch—

"With you I rejoice in the rapid progress of prohibition sentiment. It looks as if an old prediction of mine will come true sooner than I expected it would. The prediction that the time would come when it would be thought as incredible that a civilized, Christian people ever tolerated a saloon as that a civilized Christian people ever tolerated human slavery."

Indianapolis News, discussing editorially the brewery saloon, and quoting with approval George Kibbie Turner—

"The whole system is based on contempt for and perversion of law. The car-barn bandits, the hold-up men, and the stranglers are no worse than the men—nay, they are not nearly so bad as the men—who create the conditions which breed them.

"It is more immediately alarming than the unregulated sale of liquor; not only because every act committed under it impairs or breaks down the civilization; but because, indirectly, the purchase of authority—particularly of the police—rots society

at its foundations and atrophies the power of dealing with crime of all descriptions."

"In the jungle you would call this thing savagery. In the city it is the legalized branch of the sale of dissipation."

Socrates—

"While the intemperate man inflicts evil upon his friends, he brings far more upon himself. Not only to ruin his family, but also to bring ruin on his body and soul, is the greatest wrong any man can commit."

God give us men! A time like this demands
Strong minds, great hearts, true faith, and ready hands;
Men whom the lusts of office cannot buy;
Men who possess opinions and a will;
Men who have honor; men who will not lie;
Men who can stand before a demagogue
And damn his treacherous flatteries without winking!
Tall men, sun-crowned, who live above the fog
In public duty and in private thinking.
For, while the rabble, with their thumb-worn creeds,
Their large professions and their little deeds,
Mingle in selfish strife – lo! Freedom weeps,
Wrong rules the land, and waiting Justice sleeps!

—*J. G. Holland.*

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